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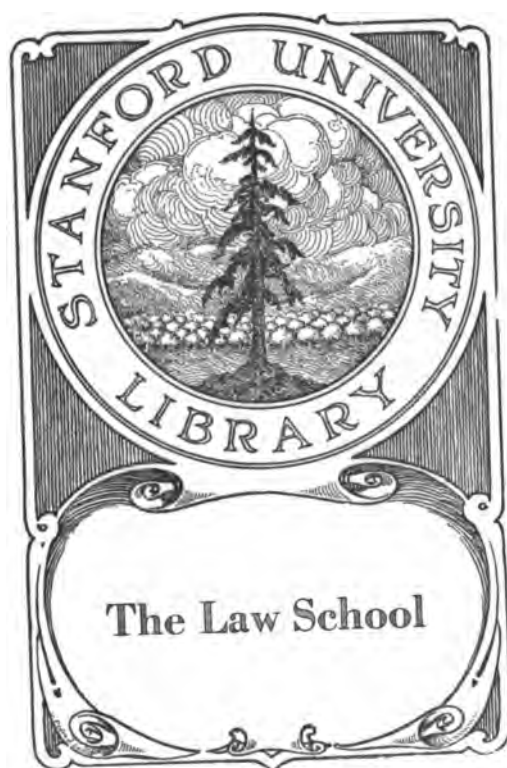
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The Queensland Law Journal

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From 19th FEBRUARY, 1890, to 12th OCTOBER, 1892.

EDITED BY P. B. MACGREGOR, BARRISTER-AT-LAW, AND M. J. O'SULLIVAN (ASSOCIATE
TO MR. JUSTICE REAL).

THE CASES REPORTED BY GEORGE SCOTT, BARRISTER-AT-LAW.

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Associate to His Honor The Chief Justice.

VOL. IV.

NORTHERN SUPREME COURT, TOWNSVILLE.

CHUBB, J.

Feb. 19th, 1890.

In re MONAHAN, INSOLVENT.

Insolvent—Last examination—Insolvency Act
(83 Vict., No. 5), s. 165.

When official trustee desired to examine an insolvent on his passing his last examination, leave to hold the examination before the police magistrate at Charters Towers refused, and examination ordered to be held before the Court at Townsville.

IN this case the insolvent applied to pass his last examination before the police magistrate at Charters Towers, where the majority of the creditors were stated to reside. The official trustee—no creditors' trustee having been appointed—opposed the application on the ground that he wished to examine the insolvent.

Jameson, for the insolvent: He is entitled to be examined where the majority of the creditors reside. *Re Hurford*, cited in *Harding and Macpherson's Insolvency*, p. 101. The official trustee can go up to Charters Towers to examine him.

Macnaughton, for the official trustee: The official trustee has a right to examine the insolvent publicly when he goes up for his last examination. *Ex parte Crump*, L.R., 1 Ch.D., 580. As the creditors cannot intervene without an order of the Court, *Insolvency Act*, s. 114, the real question is whether the convenience of the official trustee or of the insolvent is to be regarded. Leave to pass the last examination before a police magistrate

will only be given when the examination is a mere formality.

CHUBB, J.: I order that the last examination of the insolvent take place before the Court at Townsville, on 25th March. Here the official trustee is also the Registrar of the Court, and it would obviously be inconvenient for him to go to Charters Towers.

Solicitors for insolvent: *Marsland & Marsland*.

Solicitors for official trustee: *G. A. Roberts & Lou*.

MARCH SITTINGS OF THE FULL COURT.

BERNECKER v. WHITE.

Brands Act of 1872, sec. 27, and Brands Act Amendment Act of 1884, sec. 2—Limitation of time for information after discovery of offence—Costs to the Crown.

B. was convicted under the above statutes of illegally branding a cow, upon an information laid by the Inspector of Brands, more than a month after the discovery of the branding by the owner W., but within a month of the time when W. informed the inspector thereof.

Held, that the limitation of time in sect. 2 of *Brands Act Amendment Act of 1884* relates to the discovery of the offence by the person laying the information, and not to any person who may first make the discovery, and neglect to lay an information.

The Crown, having appeared and succeeded on behalf of the Inspector for Brands, are entitled to costs.

Bernecker had been convicted under the *Brands Act of 1872*, sec. 27, of illegally branding a cow, the property of White, by putting his own un-

registered brand on it. The alleged illegal branding was said to have been in June, 1889. White informed Ferry, the Inspector of Brands, and prosecuted on the 2nd December, 1889, and Ferry, after inspection of the cow, laid an information on 18th December, 1889. White had heard, about six months before 2nd December, 1889, that his cow bore defendant's brand.

Rutledge for the defendant, appealed and obtained, before MEIN, J., at Chambers, a rule *nisi* for a quashing order against White and the convicting justices, on the ground that the breach of the provision of sec. 27 of the *Brands Act of 1872*, complained of, was discovered more than one month before the information was laid; the rule asked for costs against White.

Rutledge & Lilley now appeared for the appellant, and moved the rule absolute on the same ground. White was the person who should have laid the information. White put the law in motion, and got the Inspector to lay the information. White had made a discovery of the breach of the law six months before. Referred to *Metropolis Local Management Amendment Act*, 25, 26 Vic., c. 102, s. 107, as an analogous Act; and to *Brutton v. St. George's Vestry*, 13 Eq., 339.

LILLEY, C.J.: Can there be any reasonable doubt about the language of the section; discovery is when a man has reasonable ground to believe that an offence has been committed. Here it is the discovery by the person who prosecutes, that is meant.

Real: The discovery by the Inspector was on the day that White informed him; he went and inspected the beast, and within a month laid the information. The rule should be discharged.

LILLEY, C.J.: This was a prosecution by the Inspector of Brands,—a public officer charged with the administration of the *Brands Act*, which is an Act of public policy, and for the protection of the public. One object of the statute is to prevent the commission of felonies, and other offences against persons owning stock. There was a public officer prosecuting,—Mr. Ferry—on the information given him by Mr. White, who

alleged that his cow—or calf at the time probably, when the brand was put on—had been wilfully branded by the defendant, Bernecker. Our judgment must rest upon the interpretation which we put upon the *Brands Act Amendment Act of 1884*. The prosecution originated under the 27th section of the principal Act of 1872, which provides that,

if any person wilfully brand any stock of which he is not the rightful owner, or shall wilfully cause, direct, or permit any stock of which he is not the owner, to be branded with his brand, such person shall on conviction for every such offence in a summary way, forfeit and pay any sum not exceeding fifty pounds.

Well, as I have said our judgment must rest on the interpretation which we put on the 2nd section of the Amending Act. Originally the information for a breach of this statute must be laid within six months of the commission of the offence. For some reason or other the Legislature saw fit to alter the law, and they enacted in this 2nd section of the Amending Act, that—

on information for a breach of any of the provisions of the 27th and 28th sections of the said Act, may be laid and prosecuted in a summary way at any time within one month from the discovery of such breach, anything in any law or statute to the contrary notwithstanding.

Now, our interpretation is that discovery is made under this section when the person who prosecutes has reasonable ground for believing that an offence has been committed. The person who prosecuted here was the Inspector of Brands, a public officer prosecuting for a public offence, who laid the information within one month of the time when he made the discovery, within the meaning of the statute, as we interpret it. It was not until White, the owner, informed him—Ferry—that Bernecker had branded his cow, that he can be said to have had reasonable ground for believing that an offence had been committed. Probably it might be extended to the time when he went to satisfy himself, by inspection of the animal, that the double brands were on it,—first, White, the owner's brand, and then, on the same side, Bernecker's brand. That being so, he laid his information within the time limited by the statute. First, then, discovery means when the person

prosecuting has reasonable grounds for believing that an offence has been committed, and second, the limitation is against that person and not against the actual owner. Any other interpretation would lead to this:—fifty different persons may have discovered this and not prosecuted, if they chose to wink at it and not do their duty. We would then have to go back to the person who first discovered the offence, and a man might go without punishment. The old limitation is gone, and this goes back to the old rule of law with respect to larcenies, that the offence is not purged until the offender is convicted or acquitted, unless he can show that the person who laid the information discovered the offence more than a month before. That being so, the rule must be discharged.

MEIN, J., concurred.

Real asked for costs. The Crown had appeared in the interests of the public and succeeded, and was therefore entitled to costs.

Rutledge: Costs were asked by appellant against White. This was a case of first impression and of public importance. The Crown ought not to get costs.

LILLEY, C.J.: My brother Mein has a strong impression that the Crown should not have costs. I am inclined to disagree with him. This is a public officer, and the Crown comes here to defend his act. I think it ought to go with costs. Rule discharged with costs.

Solicitors for appellant: *Rüthning & Byram*.

Solicitor for respondent: *Gill*, Crown Solicitor.

In re MARSLAND AND MARSLAND'S COSTS.

MARSLAND AND MARSLAND (APPELLANTS) v. NEW DAY DAWN FREEHOLD GOLD MINING COMPANY, LIMITED (RESPONDENTS).

Taxation of costs—Costs for conveyancing business—Use of printed form of lease—Additional Rules as to Costs under Judicature Act, 7th December, 1876—Copies.

Where many leases are drawn for a client in the same form, which is printed, each lease is a separate transaction, and should be taxed separately. The solicitor cannot

discharge himself from the care and responsibility attaching to the investigation of a title and the drawing of a conveyance, even where a printed form is filled up. Drawing is the application of the mind to the preparation of the deed, not the actual writing.

APPEAL from HARDING, J., at Chambers, in respect of an order as to appellant's bill of costs for investigation of titles and drawing leases, disallowing costs of drawing 54 leases which were printed forms similar to one on which full charges for instructions, investigation of title and drawing were allowed.

Sir S. W. Griffith, Q.C., Real and Lilley with him, appeared on behalf of the appellants, Messrs. Marsland and Marsland; *Power and Byrnes* for the respondents, the New Day Dawn Freehold Gold Mining Company, Limited.

Griffith: The point at issue related to a number of leases, adjacent to their claim, which the New Day Dawn Company took from the surrounding owners, and which appellants had prepared for them. The title of each of these leases had to be investigated. They were all drawn up in the same form, which was printed, and required the insertion of a few particulars only. There were no rules as to taxation of conveyancing matters, but if the use of printed forms was to be cut down to the cost of printing only, as the respondents sought to have done, the real property transfer of an estate worth hundreds of thousands of pounds would be a few pence only. The original charge was £5 3s. 4d.; £4 11s. 4d. was allowed by the Registrar, including instructions, examination of title, and preparation of lease. There were 55 of these leases: the original one and 54 others. They involved £18,000. He referred to the historical statement by Kay, J.—*Stamford v. Roberts*, 26 Ch.D., at 159—referring to *The Solicitors' Remuneration Act of 1881*. Here nobody supposed that the solicitor drew out each conveyance over again, but he took a form near what he wanted, and worked out the necessary alterations. He had to examine and compare it when made, however made, to see that it was correct. The principle of the order appealed from was wrong in allowing only for mechanical work.

LILLEY, C.J.: Skill and responsibility are a serious element to be considered. You cannot detail a solicitor's bill for conveyancing work. A draft may be made and tried, and an error discovered, and the solicitor has to go over it again. He cannot discharge himself from the care and responsibility attaching to filling up even a printed form.

Power: Skill and responsibility were amply allowed for in Mr. Justice Harding's order. It was competent for the Registrar to allow one hundred guineas for the first lease. The charge was excessive for the others.

Byrnes: Marsland and Marsland had charged in a peculiar way—for instructions, for drawing, and engrossing. It was only a question here of principle that appellants could appeal on. The learned Judge decided that they had charged for drawing what they had not drawn. If they had drawn their bill badly, the other side should not suffer or be prejudiced. The rule followed by the Registrar seemed to have been that at p. 726 of *Harding's Acts and Orders*. Mr. Justice Harding had said—I construe printing as another drawing or engrossing, but as the solicitor does not seem to know how to draw up a bill of costs, I think the Registrar should allow a large item for the first lease.

LILLEY, C.J.: That is the error of principle. He robs Peter to pay Paul—makes the first man pay for all the others. What is drawing? It means the application of the mind to the preparation of the deed, not the actual writing.

MEIN, J.: That is not one bill, but 55 separate bills for as many conveyances, put together and taxed at one time. My brother Harding seems to have treated these several transactions as one instead of separate. I think the solicitors properly treated each transaction as a separate one, and charged for it accordingly. In the absence of rules in conveyancing work, they adopted a particular form of bill. The Registrar enquired properly into the circumstances surrounding each particular case, and allowed for drawing and preparing each lease. I think the charges allowed by him at £4 11s. 8d.,

under the circumstances, and looking at the nature of the transactions and other incidentals, were not unreasonable.

LILLEY, C.J.: I agree with my brother Mein. The appeal is allowed. Our learned brother Harding's order is rescinded, and the summons on which the order was made is dismissed with costs; costs of appeal allowed, except so far as relates to the costs of the adjournment.

Solicitor for appellants: *Hellicar*.

Solicitor for respondents: *Bunton*.

IN CHAMBERS.

LILLEY, C.J.

April 11th, 1890.

In re JOSEPH FRANCIS QUINN, AN INSOLVENT.

Crown Lands Act of 1876, sec. 49—Certificate to selector during his insolvency—Title to trustee—Right of Crown to costs on application.

A selector under the *Crown Lands Act of 1876*, was adjudicated before conclusion of term. The Secretary of Lands had issued the certificate of fulfilment of the conditions by insolvent before the close of insolvency.

Held, that the property had been acquired during the insolvency, and had therefore vested in the trustee thereunder.

Held, also, that the Crown was entitled to the costs of coming into Court upon an application where its officers were in doubt as to the rights of the trustee and the insolvent.

MOTION to make absolute a rule *nisi*, granted 31st March, to declare a selection of 163 acres taken up by insolvent under the *Crown Lands Act of 1876*, to be property divisible amongst the creditors of the insolvent's estate, and for an order that the Secretary for Lands should issue a deed of grant for the same in the name of G. H. Wildie, the trustee of the estate.

Insolvent selected the land, which was portion 3 of section 3, Parish of Charleville, County of Orrery, as a homestead selection, on 1st May, 1884. He was adjudicated insolvent on 24th April, 1889, and the insolvency was not yet closed. The term of five years terminated in May, 1889, and all conditions required by the statute had been fulfilled. A certificate was issued on 20th January, 1890. The trustee applied to the Secretary for Lands for

a grant of the property to him, which was refused, as the Minister was doubtful of the trustee's right.

Lilley moved the order absolute, on behalf of the trustee, and cited sec. 49 of the *Crown Lands Act of 1876*; and *In re MacPherson* (unreported) in this Court. The insolvency had taken place before the term had expired under the Act. On proof of the expiration of the term, the grant should be issued, and the property should then go to the trustee. The insolvent's right to the land was admitted by the Crown. During the term the Crown dealt only with the selector. The term had now expired, and the insolvency had been kept open. The trustee of the selector's estate was now entitled to the land, and the grant should be issued directly to the trustee as such trustee.

Real appeared for the Secretary for Lands.

The question of costs of the Crown appearing was mentioned by counsel, but they were not asked for by *Real*.

LILLEY, C.J.: The officers of the Crown have the right to invoke the opinion and aid of the Court on questions of this kind, and they will be entitled to their costs, if asked for. However, you do not ask for costs, Mr. *Real*, as this is a case of first impression. Here the title will be deduced. It appearing that the certificate has been issued to the insolvent during the insolvency, —before its close,—the land is a property acquired during the insolvency, and therefore his right to that property has vested in the trustee under the insolvency. The grant therefore must issue to the trustee. My order must contain the deduction of the title from the insolvent through the Crown to the trustee in the insolvency. I may say that nothing I have just said precludes the officers of the Crown, if they think fit, acting on their own advice. My order is as follows:—

Minute of Order: Declare that, it appearing that a certificate has been issued to insolvent for selection 3 of portion 3, &c., pending and before the close of the insolvency, the land is property acquired during his insolvency, and therefore his right to that property has vested in the trustee

under the insolvency. Let grant therefore issue to the trustee. This order to deduce title from the insolvent through the Crown to the trustee. Trustee's costs hereof out of the estate.

Solicitors for trustee: *Bernays & Osborne*.

Solicitor for Secretary of Lands: *Gill*, Crown Solicitor.

APRIL SITTING OF THE FULL COURT.

THE QUEEN, ON THE RELATION OF JAMES SCOTT
v. COOPER.

Election—Ouster—Procedure—Local Government Act of 1878, ss. 54–59 and 85.

The Shire of Ithaca was subdivided by proclamation in November, 1889, into three wards or subdivisions. At a municipal election held in February, 1890, no polling place was appointed within the boundaries of one of the wards,—No. 2,—as required by section 85 of *The Local Government Act of 1878*; the voters' roll for the ward and used for the purposes of the election, was not made out in accordance with section 59, from the voters' roll in use at the time of subdivision, but was compiled directly from a list which had been revised in accordance with sections 54 *et seq.* The roll for the ward, moreover, did not include the trades and occupations of the voters named therein, as in schedule 7 to the Act.

Held, that these sections as to procedure were not merely instructive, but were compulsory; and that it was not discretionary with the Court to relax the law in favour of persons who disregard statutory provisions laid down for their conduct in connection with elections.

The King v. Parry, 6 Ad. & E., 810; *The Queen v. Fordham*, 11 Ad. & E., 73; *The Queen v. Rochester*, 27 L.J., Q.B., 45, etc., not followed.

MOTION for order absolute for ouster against G. E. Cooper, from the office of councillor for subdivision No. 2 of Ithaca Shire, on the relation of James Scott, a ratepayer of the said shire.

Ithaca Shire had been subdivided by order of the Governor-in-Council, into three subdivisions or wards, on 27th November, 1889. Previous to that date, a voters' list for the whole shire had been prepared in accordance with section 51 of *The Local Government Act of 1878*, and had been duly revised and signed by a revision Court by 25th November, 1889. The order-in-council was issued before a voters' roll could be prepared from this list as required by section 59; and the shire clerk omitted to finally make up the roll, as if the

shire had not been subdivided, and made up from the revised list three separate rolls for the three subdivisions. These were printed, and through inadvertence were headed as voters' lists instead of voters' rolls, and the names of the members of the revision Court signing the original list, and the name of the clerk were printed at the end of each, instead of the clerk's name only. These lists or rolls moreover, did not contain the trades or occupations of the ratepayers named therein, as provided for in the 7th schedule to the Act.

An election of councillors was held on 4th February, 1890, in which these lists, so prepared, were used, and amongst others elected and declared returned as councillors was the respondent, who was one of three returned for subdivision No. 2. For this election no polling place was appointed by the returning officer within the proclaimed boundaries of No. 2 subdivision or ward, as required by section 85 of the Act. There were polling places on the further sides of the roads on the northern and southern boundaries of the subdivision, just outside these boundaries.

At the March Sitzings of the Court, *Cor*: LILLEY, C.J., and MEIN, J., on the application of *Real* for the relator, a rule *nisi* for ouster was granted against respondent and other elected councillors for the shire, on the following grounds:—(1) That at the election of 4th February, 1890, there was no polling place within the boundaries of No. 2 subdivision; (2) that the documents used as voters' rolls at the said election, did not contain the trade or occupation of any of the persons named therein; and (3) that the alleged voters' rolls were not made out from the rolls in use in the said shire at the time when the said shire was subdivided, and that they were in fact voters' lists only, prepared before the subdivision. On a subsequent application, the rule was limited to the respondent.

At the April sittings of the Court, *Cor*: LILLEY, C.J., and MEIN, J.—

Real moved the rule absolute; *Sir S. W. Griffith, Q.C., Rutledge* with him, appeared on behalf of Cooper to shew cause.

Griffith: That there was no polling place within subdivision No. 2, was absolutely and literally true. The boundary lines ran along the middle of the roads which were the north and south boundaries of the subdivision, and there were polling places on each of those roads. The only defect was that these polling places were on the wrong sides of the roads. Two voters had sworn that they voted and that these places were convenient. It was physically impossible for the shire clerk to have made out an alphabetical copy of the voters' lists revised in November, or voters' rolls, before the subdivision was made. The rolls he made out for the several wards were the same in every particular as if he had gone through the form of copying out a roll for the whole shire before making them out. The making of a roll for the whole shire was then a useless performance, and the affairs of a public body would not be thrown into confusion because it had not been done. It was a merely technical objection. The revised list contained all the names of voters, but instead of being one body and voting together, the voters were by the Order in Council divided into three electorates. The only irregularity was in the clerk not making out an intermediate document. The roll formerly in use had ceased to exist since the revised list had been signed, so that that could not be used in making up the rolls for the three subdivisions. As to the omission of the trades or occupations, it was sworn that the materials were not available to enable the clerk to state them. There was nothing in the Act to show that a failure in these forms would invalidate an election; and there was no manifest injustice done. The Court would not then interfere. *The Queen v. Rochester*, 27 L.J., Q.B., 45; *The King v. Norwich*, 1 B. and Ad., 810, at 817; *Le Feuvre v. Miller*, 28 L.J., M.C., 175; *The Queen v. Fordham*, 11 Ad. and E., 73; *The King v. Parry*, 6 Ad. and E., 810. From these cases the rule to be derived was that the provisions of the statute were instructions to the municipal officers, and, if they were substantially complied with, the Court would not invalidate the whole

procedure in an election. *The Queen v. Lambeth*, 8 Ad. and E., 356; *The Queen v. Ingall*, 2 Q.B.D., 199.

LILLEY, C.J., referred to *R. v. Barton*, 1 Q.L.J., Suppl., 16.

Griffith, Q.C.: The Court had a discretion in such cases as this. Further cases were *Siddell v. Vicars*, 39 Ch.D., 92; *The Queen v. Ward*, 8 Q.B., 210; *The Queen v. Cousins*, 8 Q.B., 216; *The King v. Incumbent of Gould*, 4 L.T., N.S., 322; and *Ex parte Smith*, 8 Vict. L.R., 208. The relator had not shown, what he must show in order to get his rule, that the law clearly had been violated, and an injustice perpetrated. The rule should be discharged with costs.

Real in reply. This was a case in which the discretionary power of the Court should not be exercised. In most of the cases cited by his learned friend, the judges apologised for their decisions, on the ground that, if they decided otherwise, they feared the grave consequences of disorganising corporations. No such consequences would follow here; there was provision in the Act for the old councillors holding office until the new were elected. The true principle of the case was laid down in *Gothard v. Clarke*, 5 C.P.D., 253; and in *The Queen v. Bulcock*, 1 Q.L.J., 103. If the Court decided that there had been no election, then the old councillors held office until a new election, or the Governor-in-Council could appoint new members. The absence of the individuals sought to be ousted would in no way affect the corporation. It was not dissolved by ousting them. As to the first ground, it was specifically enacted that there must be one polling place within each subdivision. That was imperative, and came within the principle laid down by The Chief Justice in *Ex parte Bulcock*, and as in *Gothard v. Clarke*. The lists used could not be called voters' rolls; there was no voters' roll except that which had been in use before 27th November, that used in the previous January. Section 64 required the roll of each subdivision to be made up from the roll in use. The list in question was not the roll in use.

The documents in use were lists only, and they did not comply with section 58, which said they should be in the form of schedule 7. In this case, from the very inception, the compilation of the roll, the manner of carrying out the election, in appointing the polling places, there had been breach of the statute. No injury would be sustained by the intervention of the Court. It was specially provided that where persons were ousted by the Court, extraordinary vacancies were created, and new elections should be held. *The Queen v. Tugwell*, 3 Q.B.R., 704; *The Queen v. Hammond*, 17 Q.B.R., 772; *The Queen v. Harvey*, 3 Gale and Davison, 246; *The Queen v. Kelly*, 3Q.L.J., 153.
C.A.V.

On 3rd April, the considered judgment of the Court was delivered by—

LILLEY, C.J.: This matter stands for judgment on a rule *nisi* obtained by the relator, James Scott, against George Edward Cooper, who fills at present the office of councillor for Subdivision No. 2 of the Shire of Ithaca. The rule was granted on three grounds:—first, that at the said election (held on 4th February, 1890) there was no polling place within the boundaries of No. 2 subdivision or ward, as required by the provisions of *The Local Government Act of 1878*; second, that the documents used as voters' rolls at the said election, and in particular the alleged voters' roll for No. 2 subdivision, did not contain as required the trade or occupation of any of the persons named therein; and third, that the said alleged voters' rolls were not made out from the voters' roll in use in the said shire at the time when the said shire was subdivided, and that the said rolls purported and were in fact voters' lists only, prepared before the subdivision of the said shire. Now, in relation to the facts, I think we may say we are satisfied that they are substantively clear, as they are stated in the grounds set out in this rule. That being so, we have to consider what law is applicable to this application—whether, in fact, the rule is to be absolute, or is to be modified, or to be dismissed. The respondent's counsel have cited a number of English cases, in which the Courts

have held that, where there were irregularities, it was in the discretion of the Court to regard the provisions of the law or Statutes as directory, as in the nature of instructions; and, especially where the consequences might be very serious, they have held that they had a discretion to withhold from granting a rule for *quo warranto*, which is in the nature of the ouster now applied for here under our Statute. Scott, the relator, seeks that Cooper, the respondent, may be ousted, on the ground that his election was bad for illegality; and contends that, if we have a discretion in one or all cases, we ought not to exercise that discretion in favour of the councillor. Now, the English cases cited in support of respondent's position, I think I may say, in some instances seem to strain the law. The Judges, feeling that very serious consequences might ensue, have adopted a *quasi*-liberal interpretation of the Statutes; instead of holding that the provisions of the Statutes were obligatory, they held that they were in the nature of instructions, and exercised their discretion, and elected to disregard them as directions in connection with a breach of the law. The question then arises, What is the nature of these requirements of our law? We think it is not a very safe thing, at all events, for Judges to exercise their discretion in favour of negligence, or to make relaxations of the law in favour of persons who disregard the provisions of the law laid down for their conduct in connection with elections. I may cite one or two instances in which English Courts have exercised their discretion, and refused to disturb an election made irregularly, and that in the face of most express directions of a Statute. In one case, when a time had been prescribed for an election, and the time had been allowed to pass, and no election was made, they have directed that an election should be held notwithstanding, because in a case of that kind the functions of the corporation would be suspended. So in another case, when the result would be the dissolution or extinction of the corporation itself. Why, in such a case as that they have held that they would exercise their discretion against granting a rule

and allow matters to stand as they were—that is, in violation of the law, where a party has been irregularly elected. Let us take the first ground of this rule, that there was not one polling place within the subdivision. Now the provision of the law as to polling places is contained in section 85—

For the purposes of every election, the returning officer shall from time to time appoint and abolish the polling places, but so that where the municipality is subdivided there shall be always one polling place at least in every subdivision thereof, and that no polling place shall be appointed or abolished after the day succeeding the day of nomination.

Now, is that a directory provision, is it a mere matter of instruction, or is it something going to the very foundation of the election? If it is a mere matter of instruction, or direction, why then we might relax the stringent terms of the enactment, perhaps, by holding that there had been a substantial compliance with it, and that no mischief had ensued, and that matters would have been very much as they are if the polling place had been within the subdivision. But ought and can we so do? We are not confronted here by the difficulty or danger which was before the English judges in most of the cases, where they were constrained to hold that the law can be directory, or merely instructive, because the Legislature could not have foreseen that disregard of that direction or instruction would have been followed by such serious consequences, else they would have taken care to avoid the mischief. Here no serious consequences will ensue. There must be a new election; possibly there may be some infliction of costs on the respondent, but that we cannot help. If the law is in favour of the relator, he has a right to vindicate it, and not at his own cost. Looking at this section, we think it is clearly compulsory. There must be surely some end to the laxity in connection with these directions as to elections. Are we to hold that they are mere directions and instructions, and not matters which the Legislature intended should be complied with? If we undertook a wide exercise of such discretion, we should have to set aside the enactments of the Legislature, and make laws for elections and their

conduct. The law is made by the Legislature, and therefore must be obeyed. We say this is a compulsory provision, and must be observed, and it is not for us to consider whether the polling place might be six yards or 600 or 6,000 yards outside, because if they could hold a poll outside the subdivision, the clerk might have held it at some place most convenient to himself, and nobody might have presented himself to vote. He might have done so at Cleveland or Toowoomba, or any place convenient for himself. Now here, all places except one may be outside the subdivision. Polling places may be provided outside for convenience of voters, but there must be one within the subdivision itself. This being a compulsory provision, there are no dangers here such as faced the English judges; for, the law making ample provision for re-elections, as in the case of vacancy, there can be no harm, except that Mr. Cooper unfortunately pays costs. The observance of this provision is essential to the validity of an election. In respect of the second and third objections, we might possibly have held—though I am not very much inclined to hold these provisions directory—if there had been a very slight departure from the requirements of the Statute, and no mischief had ensued, that they were directory provisions. I am not inclined myself—my mind is somewhat against—holding these provisions of the Legislature to be directory, unless, in a very clear case, I could say that the Legislature, knowing that some formidable mischief would arise if they were not observed, could scarcely have intended that they should be absolutely compulsory. Therefore we hold, on the first ground, that the rule must be made absolute; and, in making it absolute on the first ground, we would add our opinion that clerks of shires and other officers of local government bodies should be very careful in observing the provisions of the Statute, because we do not believe the Legislature, in making these provisions, are merely instructing persons how an election should be held. We believe they are seriously discussed as matters of public policy in Parliament, and that the will of Parliament should be observed, as far as it is humanly possible to

observe it. Our opinion being that this 85th section is compulsory, and must be observed, we make the rule absolute; and, though we regret it, the costs must go against Mr. Cooper.

Griffith, Q.C.: The principal costs have been incurred on the second and third grounds.

LILLEY, C.J.: Well, we hold you are wrong on those grounds. You are wrong all through; and, further, we direct, in addition to making the rule absolute, that it should be modified to this extent, that the voters' roll for the whole division shall be made up from the November lists; that the list from which these irregular lists were compiled, and the lists for the several subdivisions, are to be prepared from that, and that there shall be a new election, as for extraordinary vacancy.

Solicitors for relator: *Lilley & O'Sullivan.*

Solicitors for respondent: *Hart & Flower.*

GREAT FREEHOLD MINING ESTATE, LTD., v.

GARDE.

Small Debts Court—Jurisdiction—Action for calls due—Appeal to District Court—"Small Debts Court Act of 1867," sect. 2, and "District Courts Act of 1867."

Small Debts Courts have jurisdiction to entertain actions for debt on calls, and to determine incidental questions arising thereon.

MOTION to make absolute a rule *nisi* for a writ of prohibition against the Judge of the Central District Court and the defendant, Garde, granted by The Chief Justice, at Chambers, on 19th March, 1890.

It was sought to quash an order of the Judge of the District Court, made by him on 7th January, 1890, under the following circumstances. In September, 1889, the plaintiff company sued defendant in the Small Debts Court, at Maryborough, for £14 16s., amount of calls due by him as a shareholder in the said company. Defendant's defence was that he was not a member of the company, having surrendered his shares and paid up all calls then due, and was never indebted. The Small Debts Court held that defendant was a member of the company, that his surrender had

not been accepted by the plaintiffs, that the calls were due and payable by him, and gave a verdict for the amount claimed with costs.

The defendant gave notice of appeal, and did appeal to the District Court sitting at Maryborough. This Court sat in January, before Judge Miller.

Real, for appellant, contended that the defendant below having raised the question as to his being a member of the respondent company, the jurisdiction of the Small Debts Court was ousted, and referred to the 1st proviso of Sect. 2 of the *Small Debts Court Act of 1867*.

The Judge held that the Small Debts Court had no jurisdiction to hear and adjudicate in the case, and intimated that he would dismiss the case.

Morton, solicitor for the respondent company, contended that, the Judge holding as he did, the case was properly one for prohibition by the Supreme Court, and applied under Sect. 7 of the *District Courts Act of 1867*, for an order striking out the appeal with costs, for want of jurisdiction.

The Judge refused the application, and stated that he had the power, as a superior Court, to order the Small Debts Court to keep within the limits of its jurisdiction, and ordered that the appeal be upheld, and that the case in the Court below be dismissed with costs against the respondent company.

Before The Chief Justice at Chambers—

Byrnes appeared for the company, and obtained the rule *nisi* for prohibition, on the ground that the Judge of the District Court had exceeded his jurisdiction by circumscribing the jurisdiction of the Small Debts Court.

Lilley now appeared to move the rule absolute; and *Real* to shew cause on behalf of the respondent, the defendant below.

Lilley: This was a simple case of debt, and did not come under the proviso of sect. 2 of the *Small Debts Act of 1867*. The rule should be made absolute.

Real cited sect. 34 of the *District Courts Act*, and *Bullen's case*, 1 Q.L.J., 50. The calls in respect of which this action was brought were

made subsequently to the defendant's surrender of the shares, and the question to be decided was whether he had ceased to be a shareholder or not, and was outside the jurisdiction of the Small Debts Court.

Lilley: In the Small Debts Court this was a simple case of debt, the only question being, were the calls properly made and notice properly given; and there was jurisdiction for that. The District Court was a Statutory Court and had no power to make an order in the nature of a prohibition on the Small Debts Court.

LILLEY, C. J., delivered judgment:—It is clear that there is a jurisdiction in the inferior Courts to entertain actions for debt on calls and to enforce their recovery, and in doing that all incidental questions may be determined. The Judge's act here was in perfect good faith, upon a misconception of *Bullen's case*. If either party had objected in the Small Debts Court to the jurisdiction, and that Court had decided upon that, they could then have gone to the District Court Judge, and he could have given his decision. Then they could have asked him to state a special case for this Court. Let the rule be dismissed without costs. We do not limit the rights of parties in either case to bring another action below.

Solicitors for appellants: *Morton & Powers*.

Solicitors for respondent: *Lilley & O'Sullivan*, agents for *Stafford*, Maryborough.

IN CHAMBERS

LILLEY, C.J.

{ March 31st, 1890.
{ April 2nd, 1890.

QUEENSLAND CARRIAGE, WAGGON, AND TEAMCAR CO., LIMITED c. SOMERVILLE;
YOUNG, GARNISHEE AND CAMPBELL AND SONS,
CLAIMANTS.

Attachment—Moneys payable on condition not yet fulfilled, not subject of garnishment.

In a contract to build a house, it was agreed that payment should be made, at completion, upon the architect's certificate. Judgment creditors sought, before completion of the contract, to attach the moneys which would become due on the signing of the certificate. *Held*, that there was neither a debt due, nor accruing due.

APPLICATION for garnishee order absolute.

O'Shea, solicitor, appeared for the judgment creditors; *Lilley* for the garnishee; and *Real* for the claimants.

The moneys sought to be garnished were for a building in course of construction by defendant, who, under the contract between him and the garnishee, could not receive payment until his work had been passed by the architect. He was to be paid on the architect's certificate. The work under the contract was not yet completed. The claimants had a prior claim of £40 for building materials supplied to defendant.

Real: Claimants had a prior claim, but the debt was not even accruing due.

Lilley: This was not a perfected, absolute debt; it was not due or accruing due, because defendant had not done the work, and might never finish it. It depended on a condition—that was, the architect's certificate. *Webb v. Stenton*, 11 Q.B.D., 519; *Hall v. Pritchett*, 3 Q.B.D., 215; *Jones v. Thompson*, 27 L.J., Q.B., 234; *In re Cowan*, 14 Ch.D., 638; *In re General Horticultural Company*, 32 Ch.D., 512.

LILLEY, C.J.: I cannot deal with the money until Campbell has got what is owing him; and, at present, there is no debt, legal or equitable, nor is there a prospect of any. The rule *nisi* must be dismissed, with costs of all parties, to be paid by the judgment creditors.

Solicitors for judgment creditors: *Petrie & O'Shea*.

Solicitors for garnishee: *Foxton & Cardew*.

Solicitors for claimants: *Unmack & Fox*.

IN COURT.

LILLEY, C.J. 11th April, 1890.

SPARKS v. HARPER AND CO.

Injunction—Form of order.

Defendants had brought out French Coffee under labels which the jury found were calculated to lead incautious persons to suppose it was plaintiff's French Coffee. In pursuance of leave reserved, an injunction against defendant was moved; and the form in *Lever v. Goodwin*, 36 Ch.D., 1, was followed.

THE facts of the case are fully stated at 3 Q.L.J., pp. 158, 201.

Real, Lilley with him, for the plaintiff, moved for an injunction restraining the defendants, their servants and agents, from using the words "French Coffee" in and upon any labels to be applied or fixed to tins containing coffee manufactured or compounded by the defendants, their servants or agents, in such manner as to represent the same as French Coffee manufactured or compounded by the plaintiff, or from doing any act to induce the belief that the coffee manufactured or compounded by the defendants is the French Coffee manufactured or compounded by the plaintiff.

Sir S. W. Griffith, Q.C., *Feez* with him, for the defendants, objected to the form as not definite. The words "French Coffee" were not prohibited. The form in *Lever v. Goodwin*, 36 Ch.D., 1, was applicable to this case. Referred also to *Wotherpoon v. Currie*, L.R., 5 H. of L., 508, and *Johnston v. Orr-Ewing*, 7 App. Ca., 219. That form would give plaintiff all he was entitled to; his form was embarrassing.

LILLEY, C.J.: Defendants are entitled to use the words while they do not invade plaintiff's right. I think the injunction should issue in the form proposed by *Sir S. W. Griffith*:—

Order—Injunction to issue, restraining defendants, their servants and agents, from selling, offering for sale, or disposing of any coffee not manufactured, compounded by or for the plaintiff, in the wrapper and of the form of exhibit No. 8, or in any form calculated or intended to pass off or enable others to pass off such coffee as and for the goods of the plaintiff, or from doing any act to induce the belief that the coffee manufactured or compounded by the defendants is the coffee manufactured or compounded by the plaintiff. Costs, costs in the cause, to be included in the costs taxed before appeal.

Solicitors for plaintiff: *Wilson, Newman-Wilson & Hemming*.

Solicitors for defendants: *Hart & Flower*.

IN INSOLVENCY.

LILLEY, C.J.

April 23rd, 1890.

In re ALEXANDER BELL, MERCHANT, AN INSOLVENT.

Construction—"Insolvency Act of 1874," sec. 111

—Assignment of book debts by insolvent—
Title to books.

A *bona-fide* assignee of book-debts and books of account will not be compelled, upon the subsequent insolvency of the assignor, to deliver up the books which passed by the assignment. Sect. 111 of *The Insolvency Act of 1874* does not apply to persons having a legal title by purchase. The Court would, however, if necessary, order the assignee to give access to the books for inspection by the trustee of the assignor's estate.

MOTION by the trustee for delivery to him of the insolvent's books of account by the trustee of the estate of B. Sparks, an insolvent, the *bona-fide* assignee of Bell's book-debts prior to insolvency of the latter.

Lilley, for the trustee, moved for an order for delivery of the books by Sparks's trustee. Sparks's trustee could not retain them in the face of sect. 111 of *The Insolvency Act of 1874*. The trustee of Bell's estate wished to examine the books, and he was seriously inconvenienced by not having them in his control.

Byrnes, for the trustee of Sparks's estate, opposed, and cited *In re West, ex parte Good*, 21 Ch.D., 868; rule 110 of the English *Bankruptcy Act of 1869* was the same as the proviso to sec. 111 of our Act; also *In re Toleman*, 18 Ch.D., 885.

LILLEY, C.J.: No person not having a legal title shall withhold, is the meaning of that section. Can you show me a case to stretch these words to say it shall mean, there can be no assignment of book debts? I think there is a title to them here in Sparks's trustee. Who is to be inconvenienced? Not the man who bought the books. I could compel Sparks's trustee to produce the books for inspection by Bell's trustee, even though they were deposited in the Registry—at any rate to give the former access to them. Dismiss the motion with costs, to be paid out of Bell's estate.

Solicitors for applicant: *Hart & Flower*.Solicitors for respondent: *Chambers, Bruce & McNab*.

IN CHAMBERS.

LILLEY, C.J.

April 25th, 1890.

In re NILS JENSEN BIERREGARD, DECEASED.

Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, Act, 1888, sections 3, 4 and 12—Nomination of administrator by executrix.

Under sections 3 and 12 of *The Queensland Permanent Trustee, Executor and Finance Agency Company, Limited, Act*, an executrix may nominate the Company as administrator with will annexed, but if she renounced, she is then in the position of any "person interested" in an intestate estate, under section 4.

Chambers, solicitor, for the widow, the executrix under the Will of deceased, applied under *The Queensland Permanent Trustee, Executor and Finance Agency Company, Limited, Act*, that letters of administration with the will annexed, be granted to the said Company. The executrix had renounced. Had she not been named in a will, she could have come in at once under section 4 of the Act, as "a person interested" in an intestate estate, and could have authorised the Company to administer.

LILLEY, C.J.: Having renounced, she could not come in as administratrix with will annexed, and she has, therefore, no authority over the estate except as "a person interested." Practically she says, I am the executrix, but I will not act, and I will name the Company. What she must do is not renounce, but prove the will and nominate the Company as administrator. I do not see the necessity to make Acts of Parliament for the Legislature, or to stretch those made. This Act, as far as I can see, does not help her as she is now. Let her prove the will and nominate the Company, and she need not come to the Court again, except for its sanction.

Chambers: Under section 12. Then I ask leave to take the renunciation off the file.

Leave accordingly.

Solicitors for applicant: *Chambers, Bruce & McNab*.

IN CHAMBERS

LILLEY, C.J.

2nd May, 1890.

THE QUEENSLAND NATIONAL BANK, LIMITED, v.
VAUGHAN AND OTHERS*Wages Act of 1870, 34 Vic., No. 16, sec. 2.—**Mortgagee in possession—Liability for wages
—Hindrance.*

A mortgagee in possession is liable for six months' wages of mortgagor's servant, even though the mortgagor has other property, if the possession amount to hindrance or prevention. Hindrance is any impediment in the way of the servant getting his wages.

APPLICATION for a rule *nisi* on F. Vaughan, P.M., J. P. Maloney, F. L. U. Fitzgerald, and J. A. Thoms, J.J.P., at Yeulba, and Wm. Hood, to show cause why an order should not issue quashing an order, made by the said justices, on 15th April, 1890, under the following circumstances.

The appellant Bank, the defendants below, were the mortgagees in possession of the saw mill and premises of one James Green, of Channing. Hood, the respondent, had been employed by Green as engine driver for twelve years up to 20th March, when the Bank entered into possession as mortgagees. On that day he stopped work, and received a cheque for £43 3s., for wages due to date. It was dishonoured on presentation at the plaintiffs' branch at Roma. He then claimed £32 10s., six months' wages from the Bank as mortgagees of Green's property. Green had other property; but the Bank upon notice from him of his having drawn Hood's and a number of other cheques, took possession of the mill, which was the subject of the mortgage. After the dishonour of the cheque, Green had not the money to pay Hood. Green's other property consisted of a blacksmith's shop, a store, some mining shares, and a share in a land company, but he was in debt and could not raise money on them. If made insolvent, he swore, he would not be worth £5.

The justices considered that the respondent was entitled to relief under section 21 of *The Masters and Servants Act*, and section 2 of *The Wages Act of 1870*, that the mortgagor was a

person of no substance, and that the respondent was clearly prevented and hindered from recovering his wages from the mortgagor; and gave a verdict for £32 10s. and costs. Notice of appeal was given by the appellants' solicitor.

Lilley now applied on behalf of the appellants, for a rule *nisi* for a quashing order, on the ground that, the summons below showed no ground of complaint; that if there was a ground of complaint, there was no evidence to support it; that the order of the justices was made against the weight of evidence, and that there was no evidence that the respondent was prevented or hindered from recovering his wages from Green owing to the appellant Bank having taken possession, or from Green's cheques being dishonoured by them. The respondent was not hindered; there was other property of Green's, and respondent should exhaust all his means before coming on the mortgagees. This was distinct from the case of *Q. M. and A. Co., Ltd., v. Day*, 2 Q.L.J., 190; there the mortgagors were practically insolvent.

LILLEY, C.J.: Respondent's master is insolvent here; he could not pay him. The circumstances of the case may be different, but the principle is the same. The existence of other property does not matter here. I think, if there is any serious hindrance or prevention, he is entitled to relief from the mortgagees. Hindrance is any impediment in the way of his getting his wages. There was a double hindrance here—the taking possession, and the dishonouring of the cheque. There will be no rule.

Solicitors for appellants: *Hart & Flower.*

MEIN, J.

21st May, 1890.

*In re The Companies Acts, 1863 and 1889, AND
In re THE COONEANA COAL AND IRON CO.,
LIMITED AND REDUCED.*

Companies Act Amendment Act of 1889—Reduction of Capital—List of Creditors to be settled.

In an application made under section 6 of *The Companies Act Amendment Act of 1889*, for reduction of capital, a list of creditors must be settled by the judge after advertisement.

•PETITION by Company praying for the confirmation by the Court of a special resolution duly passed and confirmed, reducing the capital from £120,000 divided into 1,200 shares of £100 each, to £76,800 divided into 1,200 shares of £64 each, by reducing the liability on each share to the extent of £26, and leaving uncalled capital amounting to 13s. 4d. on each share.

Although the consent of the only creditor was filed, the judge directed a summons to be taken out for directions as to proceedings to be taken for settling the list of creditors entitled to object to the proposed reduction; and thereupon ordered the presentation of petition to be advertised in accordance with the English practice set forth in General Order of March, 1868, under *The Companies Act, 1867*, (page 97 of *W.N. for 1868*.)

Solicitors for Company: *Foxton & Cardew*.

MAY SITTINGS OF THE FULL COURT.

COMMERCIAL BANK OF AUSTRALIA, LIMITED v.

BOYD.

Practice—Trial—Omission of question to jury—

New trial under O. 38, r. 4.

On the trial of an action on a promissory note for £400, alleged to have been made by defendant, in favour of H., and endorsed finally to plaintiffs, the defendant denied having made the note, and said it was, including the signature, a forgery. He admitted having made two notes in favour of H., each for £100, one of which H. had told him was destroyed. The jury, on the question:—Was the note made by defendant?—found that it was, but for £100 only, and that the word one and the figure 1 were altered to four.

Upon this, judgment was entered for plaintiff for £100.

Held, that the questions: whether the note had been altered, and whether the alteration was apparent, should have been put to the jury; and that on that ground, there should be a new trial as to those two points, under O. 38, r. 4.

MOTION for new trial, on the ground that there was no finding of the jury to support the judgment entered in the action for the plaintiff.

The action was for £400 and interest, on a promissory note for £400, payable four months after date, alleged to have been made by defendant in favour of J. Walsh, endorsed by him to C. H. Holmes, and by Holmes endorsed to the firm of

J. D. Oswald, which firm endorsed it to the plaintiff bank. The defence was that the note, including the signature, was a forgery. During the trial it transpired that defendant had at one time signed and given two promissory notes of £100 each, for accommodation to Holmes. Defendant in evidence denied that the signature to the cheque in question was his. The following questions were put to the jury:—

1. Was the note made by the defendant?
2. Was it endorsed to the plaintiffs?
3. What rate of interest do you allow?

The jury found that the defendant did make the note, but for £100 only; and that the word one and the figure one were altered to four; that it was endorsed to plaintiff; and allowed 8 per cent. interest on £100 only.

Judgment was entered for the plaintiffs for £100, and interest at 8 per cent. and costs.

Lilley, on behalf of the defendant, moved for and obtained, at the April Sittings of the Court, a rule *nisi* for a new trial, on the ground that there was no finding of the jury to support the judgment.

Sir S. W. Griffith, Q.C., *Feaz* with him, appeared on behalf of the plaintiffs; and *Lilley*, on behalf of the defendant.

Griffith opposed the rule. The defendant had sworn he did not make the note at all for that amount, or for any other amount. It was a question of fact; if the jury had found differently, their finding would have been reversed. Their finding was the one any conscientious man would have found. It should be upheld.

Lilley: The questions of alteration of the figures, and of apparency, did not go to the jury. The parties fought about the signature, not about the figures. When the jury brought in those findings, plaintiffs' counsel should have asked that another question should be put to the jury. If the Court was against a new trial on the whole case, there should be one on the question of apparency, under O. 38, r. 4.

Griffith: As to the alteration also. The question of alteration of the note was never distinctly

tried. The questions for new trial should be (1) was the note altered? and (2) is the alteration apparent?

LILLEY, C.J.: It is a formidable objection that the question of apparency did not go to the proper portion of the tribunal—the jury. There was not a surprise in the accurate sense of the word; but there was a sudden turn in the case, when in the hands of the jury. The judge seems to have done a technical wrong by not putting the question to the jury. This was in a way a surprise to everybody; and it is in the discretion of the Court to order a new trial, where they think there has been a miscarriage of justice.

MEIN, J.: There were circumstances of surprise brought about by defendant's improper conduct in denying his own signature and writing. Had he inquired beforehand, the matter would have come out clearly on the hearing. He is now asking to be relieved from paying £100, which he is in duty bound to pay. He was inaccurate throughout his case, except in admitting he had made a promissory note for £100.

LILLEY, C.J.: We think there should be a new trial, but only on the questions of alteration and apparency. Rule absolute to set aside judgment; and for a new trial as to these two points: was the note altered, and was the alteration apparent? All costs to abide the event of the second trial. Leave to amend pleadings.

Solicitors for plaintiffs: *Macpherson, Miskin & Feez*.

Solicitors for defendant: *Hart & Flower*.

LILLEY, C.J. 16th May, 1890.
IN THE MATTER OF *The Trustees Act of 1889*,
AND OF THE WILL OF RICHARD OVERLAND,
DECEASED.

Trustees—Solicitors—Provision in will for payment as if solicitors and not trustees—Trustees Act of 1889, 53 Vic., No. 4.

Where solicitors were appointed trustees under a will, and the testator declared that they should be paid for business in relation to the estate as if solicitors, not trustees,

Held, that the clause allowed professional costs for work done, and not commission, irrespective of the provisions of the *Trustees Act*; and that such costs must be taxed and allowed for reasonable services.

REFERENCE from the Registrar on passing of trustees' accounts.

W. H. Wilson & J. R. Newman-Wilson, solicitors, were the trustees of the abovenamed testator, whose will contained the following provision:—I declare the said trustees (abovenamed) or any future trustee of my will who may be a solicitor, shall be entitled to be paid for all business (whether strictly professional or not) done by them or either of them, in relation to my estate or the trusts of my will, in the same manner as if they or either of them were or was not executors or executor, or trustees or trustee of my will.

The said trustees had personally attended to the investing of the trust funds, and their clerks had collected interest and rents, and they had in lieu of professional costs, &c., charged a commission of £5 per cent. on all income received, and such commission had gone into the general funds of their firm. It was not their intention to apply to the Court for any commission or other allowance.

The Registrar doubting the trustees' right to charge commission, the matter was referred to the Judge.

Lilley applied that the charge be allowed.

The Registrar attended.

LILLEY, C.J.: The trustees must send in their bill of costs, and have it taxed. If this is professional work, then it must be regulated by the rules for the remuneration of professional work. This clause in the will gives professional costs, irrespective of the provisions of the *Trustees Act*. Let the Registrar allow costs for work done, if he is of opinion that the services are reasonable. They will be charges for business done, and not commission.

On 28th May, His Honour passed the trustees' amended accounts in the estate, and allowed 5 per cent. on the sum of £5,819, realised by them in the

sale of the trust property, and their costs of passing the accounts, and of the application.

Solicitors for trustees: *Wilson, Newman-Wilson & Hemming*.

LILLEY, C.J. 11th June, 1890.

In re CARL AUGUST LUDWIG KREUTZ, DECEASED.

Marriage within prohibited degrees voidable, not void—English Marriage Act, 5 & 6 Will. IV., c. 54.

K had made a will in favour of his niece, and afterwards married her; he died, leaving a child, and without executing a will subsequent to marriage, or impeaching the marriage.

Held, that the English *Marriage Act*, 5 & 6 Will. IV., c. 54, does not apply in Queensland; and

Held, that, he not having impeached the marriage before death, it was good; and, there being no will subsequent to such marriage, he died intestate.

THE deceased made a will in favour of his niece on 16th March, 1886, and on 15th August following, married her. Since his marriage he had not made a fresh will. There was one child of the marriage. The widow had applied for administration of the intestate estate; and the Registrar had referred the matter to the Court.

Bernays (solicitor) applied for administration on behalf of the widow. The case turned on the question whether Lord Lyndhurst's Act, (5 & 6 Will. IV., c. 54,) passed 31st August, 1835, was in force in Queensland. It did not appear to be in force, and if not, then this marriage was voidable only, and not void. It had not been voided during the lifetime of the deceased; and section 50 of *The Succession Act* (31 Vic., No. 24,) applied, and he died intestate.

The Registrar attended.

LILLEY, C.J.: If the marriage was void, she would take under the will; if voidable only, and standing good, she would take her share under the intestacy, and the child its share. The marriage is within the prohibited degrees of kindred, and was voidable only, as 5 & 6 Will. IV., c. 54, does not apply here. The applicant's marriage not having been impeached in the lifetime of her husband,—her uncle,—it is good. The will was avoided by his marriage, and he died intestate.

She and her child, therefore, take their shares under the *Intestacy Act*. Let her administer the estate.

Solicitors for applicant: *Bernays & Osborne*.

LILLEY, C.J. 11th June, 1890.

SINNAMON AND WIFE *v.* HARDGRAVE AND OTHERS.

Cheque—Marriage gift—Decease of drawer before presentation—Final judgment.

In June or July, 1889, F. made a gift in the presence of witnesses, of £500 by cheque to S., his daughter, to whom he had promised the amount on the occasion of her marriage. He requested her and her husband to hold the cheque until 15th September following, when there would be funds available for its payment; but in August he died, and the cheque was never presented. On an action against the executors for £500, with interest, and costs, final judgment was ordered for the amount claimed, without interest; and costs were allowed both parties out of the estate.

FINAL judgment summons against defendants as executors of the late Isaiah Ferguson, deceased, for £500, upon a cheque drawn by him, payable to plaintiff, Elizabeth Mary Sinnamon, and interest thereon, £30 5s., and costs.

The plaintiff, E. M. Sinnamon, was the daughter of I. Ferguson. On her marriage with the other plaintiff, James Sinnamon, in September, 1888, it was agreed between them and Ferguson, that the latter should give her £500. Ferguson had £1000 on fixed deposit maturing 15th September, 1889, out of which the £500 was to be paid; and he made out a promissory note for £500, payable on 15th September, 1889, which however, does not appear to have been signed by him. Two letters from Ferguson to Isaac Sinnamon, J. Sinnamon's father, referring to a gift of £500 to E. M. Sinnamon, were produced. In June or July, 1889, in the presence of several witnesses, Ferguson gave the plaintiffs a crossed undated cheque for £500, with a request not to present it for payment until 15th September, 1889, on which date he then told them the fixed deposit would mature. He died on 31st August, 1889, after having made his will of which the defendants were the executors. There was no legacy to E. M. Sinnamon in the will. Two wills executed during the previous twelve months, included a legacy to her of £500.

Lilley appeared on behalf of the plaintiffs; and *Byrnes*, on behalf of the defendants.

Lilley: There was valid consideration for the cheque—the marriage of deceased's daughter. Defendants were indebted, on an account stated between them. Cited *Seago v. Deane*, 4 Bing., 459; also *Rhodes v. Gent*, 5 B & Ald., 244, as to absence of demand, owing to Ferguson's death.

Byrnes: Defendants did not wish to oppose the application. *In re Rowson, Field v. White*, 29 Ch.D., 358, had created the chief difficulty in the minds of the executors. He cited also, *In re Beak's Estate*, L.R., 13 Eq., 489. It was a question whether interest should be charged.

LILLEY, C.J., referred to *Byles on Bills*, p. 444, 4th ed.

His Honour made an order for final judgment for £500, without interest, and for costs of both parties out of the estate. It was no doubt a case of difficulty for the executors.

Solicitors for plaintiffs: *Chambers, Bruce & McNab*.

Solicitor for defendants: *Hardgrave*.

AS FULL COURT IN VACATION.

LILLEY, C.J. 6th, 11th and 18th June, 1890.
GOLDSMITH v. PINNOCK (IN ERROR).

GORRIE v. GOLDSMITH.

And in the matter of AN APPLICATION FOR AN ORDER RESTRAINING THE POLICE MAGISTRATE OF BRISBANE, (Mr. Pinnock) AND THE PLAINTIFF GORRIE, FROM FURTHER PROCEEDING ON AN INFORMATION IN REG. v. B. GOLDSMITH, on the prosecution of GEORGE GORRIE.

Justices—Practice—Proceeding upon information for perjury arising out of a Supreme Court action not yet finally determined—50 Vict., No. 17.

G. G. laid an information against B. G. for perjury in an action before the Supreme Court, in which they were respectively plaintiff and defendant. The real question at issue in the action, was whether a certain receipt, which was in evidence, bore the signature of G. G. He swore that it was not his signature, and B. G. swore that G. G. had written it in his presence.

The jury found for G. G. The alleged perjury was in respect of B. G.'s evidence as to this signature. Before the time for appeal had expired, and during the course of the hearing of the criminal charge before the Police Magistrate, defendant obtained a rule *nisi* for a new trial of the action in the Supreme Court, on the ground of discovery of fresh evidence. Application was made to the P.M. to stay proceedings in his Court, until the disposal of the rule *nisi* for a new trial; but he declined, and stated his intention to take all the evidence for the prosecution, and then remand the defendant from time to time.

Defendant then brought an action against the P.M., and obtained an order for an interim injunction, restraining him from proceeding until a certain day, with leave to serve a notice of motion for that day, for an injunction or *mandamus* to restrain him from proceeding until the disposal of the rule *nisi* in the action of *G. v. G.*

Held, that there is no precedent for an action by a defendant against a justice for an injunction or *mandamus* to restrain criminal proceedings.

Held, that, under sections 107 and 108 of the *Justices Act*, (50 Vict., No. 17), a justice has no authority, after taking evidence on a preliminary enquiry in a criminal case, to remand the defendant, pending the result of Supreme Court proceedings, but must either discharge or commit the defendant.

Though it is in a justice's discretion to proceed until restrained by the Supreme Court, it is a safe rule for justices not to entertain complaints when civil proceedings are pending in other courts, in respect of the same subject matter. *Reg. v. Ingham*, 14 Q.B.R., 396, approved.

The applicant was the defendant in a prosecution for perjury alleged to have been committed by him on the hearing of an action, *Gorrie v. Goldsmith*, before the Supreme Court, in May, 1890, in which he was defendant. After the perjury proceedings had been commenced in the Police Court at Brisbane, before the respondent, who was Police Magistrate, the Full Court, at its June Sittings, was moved, and a rule *nisi*, returnable at the August Sittings, was obtained on behalf of applicant, for a new trial of the action of *Gorrie v. Goldsmith*, on the ground of discovery of fresh evidence. Several applications were made to the respondent to stay proceedings on the information for perjury, on the ground that the rule *nisi* had been granted in the action, but the respondent had declined to discharge the applicant, and notified his intention to take all the evidence, and then to remand the applicant from time to time on bail,

until the determination of the Supreme Court proceedings, and unless ordered to do otherwise by the Supreme Court; as under the *Justices Act*, 50 Vic., No. 17, he should hear all the evidence, and then discharge or commit.

On 6th June, *Lilley*, for the applicant, obtained an order for an interim injunction upon the respondent, to refrain and be restrained from further proceeding with the hearing of the charge of perjury, until 11th June, and giving the applicant leave to serve the respondent with a notice of motion for that date, within a reasonable time before, for an injunction or a *mandamus*, to continue until the hearing by the Full Court of the motion for a rule absolute for a new trial of the action of *Gorrie v. Goldsmith*.

LILLEY, C.J., in granting the order, intimated that he thought the proceeding was not the right one; he did not like an action against a magistrate. On 7th June, he remanded the applicant until 12th June, fixing bail in a larger amount than on previous remands.

On 11th June, *Lilley* and *Woolcock*, for the applicant, moved for an injunction, or in the alternative, a *mandamus*, in accordance with the order of 6th June. *Sir S. W. Griffith, Q.C., King* with him, appeared on behalf of the respondent.

Lilley, submitted that the prosecution must be stayed, pending the re-hearing by the Supreme Court, of the matter out of which it arose. If allowed to go on, great injury might ensue to the applicant. The same question would come on for decision in the Supreme Court and in the Police Court at the same time. If the respondent held the applicant to bail, remanding him from time to time, the applicant would have to appear in the witness box on the hearing of the action, as a man under a charge of perjury. He must admit it on cross-examination, and his case would be prejudiced with the jury, a jury who might otherwise have to find on this new evidence, that not the applicant, but some one else had been committing perjury. Cited the following cases:—*Mayor of York v. Pilkington*, 2 Atk., 302; *Montague v. Dudden*, 2 Ves. Senr., 396.

LILLEY, C.J.: I have no doubt about the power of the Court; my only doubt is whether I should interfere with the magistrate taking evidence.

Lilley: A. G. v. Cleaver, 18 Ves., 290; *Reg. v. Ashburn*, 8 C. & P., 850; *Reg. v. Ingham*, 14 Q.B.R., 396; *Turner v. Turner*, 15 Jur., 218. The principle was the same throughout, that, though the Court has no jurisdiction over criminal prosecutions in general, yet it has power where a new trial is ordered, to stop anyone interfering with it. *Saull v. Brown*, 10 Ch.App., 64, would probably be relied on by the other side; but here the question to be tried on the new trial and in the Police Court were identical, i.e.: Is this George Gorrie's signature? The judgments of Lord Cairns and of L. J. Mellish, pp. 65 and 67, supported this application. Here were two courts enquiring into the same question; it was conceivable that two juries might be deciding that question opposite ways. *Ex parte Cooper*, 1 N S W. L.R., 143.

LILLEY, C.J.: I do not like the form of action here against a magistrate, and I do not want to establish a precedent for suing a magistrate for what he is doing as part of his duty, even though he commit some error of judgment. I shall put the action aside, if I can, and adopt some other method.

Lilley had not been able to find a case of injunction against a magistrate during the progress of a prosecution. As to the respondent's declared intention to remand applicant from time to time, ss. 106-107 of the *Justices Act* were against that course. Cited *Ex parte Mackenzie, Wilkinson's Austr. Mag., Cas.*, 52; *Reg. v. Evans*, L.T., 9th April, 1890. Moreover, applicant would be under the necessity of finding sureties for an excessive bail every eight days, during some months. This Court would not allow a magistrate to do that. *Kerr v. Preston Corporation*, 6 Ch.D., 463, was not adverse to the applicant's case. Whether an injunction was granted in this action as it was now entitled, or in the action of *Gorrie v. Goldsmith*, or by a specific order on the present motion, the Court had power to restrain the magistrate

from proceeding until the next sittings of the Full Court, or to order him to discharge the applicant, or to order a discontinuance.

Griffith: This was a motion for injunction by a defendant against his judge, and was absolutely without precedent. As pointed out by Fawcett, J., in *Ex parte Cooper*, an application for an injunction was made by a litigant in an action between parties, against persons instituting proceedings. Referred to *Mayor of York v. Pilkington*, and *Turner v. Turner*; the two cases which really bore upon this one were *Saull v. Brown*, and *Kerr v. Preston Corporation*, already cited. The applicant could obtain the same relief in the Criminal Court as in the Civil Court, by an indictment for invasion of a civil right. But if the criminal proceedings had been commenced before the civil proceedings here, the Court could not have interfered; quoted from Lord Cairn's judgment in *Saull v. Brown*. It was a matter for the magistrate's or the Attorney-General's discretion, not for the Court. The Court did not interfere unless the magistrate went beyond his jurisdiction; if he did not exceed his jurisdiction, and acted within his discretion, the Court did not interfere. The same question of fact arose in both proceedings, but that was not the same proceeding. The institution of the criminal proceedings was proper; the action was finished and a verdict given. The criminal proceedings had been properly introduced; it was in the magistrate's discretion to go on.

LILLEY, C.J.: This is not a matter of pure discretion in the magistrate. It would be proper for him to desist when a question of this kind was not settled.

Griffith: To proceed by injunction was ridiculous. *Mandamus* was possible to command the magistrate to discharge; so was prohibition; or an application in the action of *Gorrie v. Goldsmith*, for a restraining order. In the meantime, the magistrate knew the case simply on the fact that a charge of perjury was brought before him, and *prima facie* he was bound to go on, until something arose to show that his discretion was taken

away: *Regina v. Ingham*. He could have taken all the evidence, and then say,—“I won't commit, unless you insist.” As to remand, section 84, the *Justices Act*. He could remand for more than eight days on the request of a defendant or prisoner. The Court would act on definite principles; not on a knowledge of any facts, because it was not in possession of the material which the inferior Court had.

LILLEY, C.J.: The magistrate is acting ministerially.

Griffith: Then prohibition would lie. Prerogative rights were well known; and the Court exercised its control only in certain forms. The only way to relief here, was by an application in the action, on the ground that the magistrate was dealing with a matter before the Court, in which he was interfering with its jurisdiction. If the application were dismissed, it should be with costs.

LILLEY, C.J.: Yes, certainly:

Lilley in reply: There was no discretion in a magistrate hearing the prosecution actually commenced before the time for appeal in the action had lapsed. He had no power to go on, if by going on he would interfere with administration of justice in a higher court. He had moreover, done wrongly in increasing the bail.

Griffith stated that Mr. Pinnock would not proceed further, except to take reasonable bail, until His Honour's decision.

C.A.V.

On 18th June, the following judgment was delivered by LILLEY, C.J.

The action, *Gorrie v. Goldsmith*, was tried before me and a jury at the last Civil Sittings of the Supreme Court, when a verdict was given for the plaintiff. The sole question for the jurors was whether the signature to a receipt (exhibit No. 4) was the signature of the plaintiff Gorrie? The defendant Goldsmith and several witnesses, (among them Adolph Goldsmith) swore that they saw the plaintiff sign the receipt. The jury, however, found that the signature was not the plaintiff's, and, therefore, I gave judgment for him for the relief sought in the action. Imme-

diately thereafter the plaintiff laid an information against the defendant and his brother for perjury; the hearing was several times adjourned, the defendants being remanded on bail. Between these remands the Full Court granted the defendant a rule *nisi* for a new trial, on the ground of the discovery of further evidence which, if true, was material to shew the genuineness of the signature to the receipt, and which if so found on the new trial, would entitle the defendant to a reversal of the previous verdict, and to one in his own favour. The attention of the Police Magistrate was drawn to the fact that the Court had granted this rule *nisi*, and he was asked to stay proceedings on the information for perjury. He refused to do so, stating his intention "to take all the evidence offered on the part of the prosecution, then to remand the defendant Goldsmith until the action *Gorrie v. Goldsmith* was disposed of." On a subsequent day he said "he would proceed with the case, and, when the evidence was concluded, he would remand the defendant from time to time, until the rule *nisi* for a new trial in the action *Gorrie v. Goldsmith* was disposed of." His attention was drawn to sections 107 and 108 of the *Justices Act*, and it was submitted that on the conclusion of the evidence, he must either commit the defendant for trial or discharge him. He adhered however, to his intention "to proceed with the case, and after hearing all the evidence, to discharge the defendant, or remand him from time to time, until the civil action had been disposed of." He was afterwards served with a writ in an action, without precedent as against a justice, for an injunction or *mandamus* to restrain his proceedings. He then further adjourned the hearing to enable the defendant to obtain a restraining order, which was granted by me on a modified proceeding, and in the action, contingent on the production of a precedent for such a suit. He afterwards remanded the defendant till the 12th June, requiring largely increased bail. It is quite clear that Mr. Pinnock has no authority, after taking all the evidence on a preliminary enquiry in a criminal case, to keep the defendant

under remands to abide the result of proceedings in another Court. When he has fulfilled his ministerial duty of hearing all the evidence, he must either discharge the accused, or commit him for trial. The fundamental question to be decided in the criminal prosecution, is identical with that which has not yet been finally determined in this Court, namely, the truth or falsehood of the testimony that Gorrie signed the receipt, No. 4. When the criminal charge was last before Mr. Pinnock and when he was asked to stay his proceedings, the question was known to be still held *sub judice* here by the grant of the rule *nisi* for a new trial. No blame attaches to him for hearing the information in the first instance. This case is distinguished from those cited for the defendant in the important particular that there had been a verdict against the genuineness of the receipt, and he could not have been aware of the discovery of the new evidence. He was, of course, at liberty to continue those proceedings, and to require the defendant, as he did, to apply to this Court to restrain him, even after he knew the question was still undetermined in this Court. The justices in *Req. v. Ingham* (14 Q.B.R.) took a different course, they "considered it was not their duty to proceed upon the information, while and so long as the suit in which the truth or falsehood of such allegations or statements were to be determined by the Court, was still pending and undetermined, and that it would then and there have been contrary to public policy, and prejudicial to the due and fair administration of justice in the said suit, if they had proceeded to adjudicate upon the matter of the said information." I have no doubt of the authority of this Court to restrain proceedings in the inferior jurisdictions of the country which may prejudice the administration of justice in suits previously instituted before this tribunal, and still pending. Under other and ordinary circumstances, where there is no excess of jurisdiction, we have no authority to interfere with them, and do not. I have said that Mr. Pinnock had no jurisdiction to make a remand attendant on our proceedings. He must either discharge or commit.

If he committed, the defendant would be under the stigma of a committal by a magistrate for perjury—which must necessarily prejudice the civil issue. Upon the committal also, if the proceedings were not restrained, the defendant would be doubly harassed in defending himself in two proceedings on precisely the same question, and with the possible result that, the defendant might have a favourable verdict in the one case, and an adverse one in the other. He might be acquitted and condemned at the same time. It is a safe rule for justices not to entertain complaints when civil proceedings are pending in other Courts, in respect of the same subject matter. *Oleridge, J.*, in giving judgment in *Reg. v. Ingham*, says with reference to the justices who had acted on this rule “I think there is abundant reason here for saying that the course they took is most likely to answer the ends of justice. A suit is depending; and evidence has been given by a witness. Shall a party, perhaps interested in the result, come in, stop the mouth of that witness, and perhaps unavoidably prejudice the judge by requiring a magistrate to hear and act upon an information for perjury?” Suppose this defendant had been unable to obtain bail, or a restraining order on the Magistrate, he must in the civil trial have been brought from prison to give his evidence, and in the criminal trial, he must have been placed in the dock with his lips sealed, unable to testify on his own behalf to his own truth or good faith in giving his testimony! Thirty years ago I tried to induce our legislature to remove this anomaly in our law of evidence, but without avail. It remains to this day a puzzle to me that when every other disqualification to give evidence on the ground of interest has been removed, the accused, who is presumed to be innocent until he is proved to be guilty, should still be unable to give evidence on his own behalf. In this case, the time allowed by law to the defendant for a motion for a new trial, which is in the nature of an appeal, had not elapsed when the proceedings were instituted before Mr. Pinnock. In that respect the case had not been finally determined, even before the grant of the

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rule *nisi* for a new trial. Mr. Pinnock will probably not require the restraining order, or more than an intimation of the judgment now delivered. There will, however, be leave to apply for an extension of the order, if necessary. I wish to avoid a needless order on a magistrate who has acted I am sure, on an honest view of his duty, with a sincere desire to secure the due administration of justice, and under difficult circumstances. He might have misgivings which, I think, ought not to influence either his judgment or mine, and I think the safe general rule is the one adopted by the justices in *Reg. v. Ingham*. There is no evidence before me to shew that there was any reason for such precipitate action on the part of the prosecutor Gorrie.

No precedent has been found for the action of *Goldsmith v. Pinnock*, and it must be dismissed.

The order is: dismiss the action against Mr. Pinnock, and let the plaintiff Gorrie be restrained from further proceeding on the information in *Reg. v. Bernhard Goldsmith*, until after the hearing of the rule *nisi* for a new trial in *Gorrie v. Goldsmith*, and subject to such further order as the Court may make thereon in respect of such information. There will be no order as to costs.

GORRIE v. GOLDSMITH, ETC., (re ADOLPH GOLDSMITH).

In this case the like order was made.

Solicitors for applicants: *Chambers, Bruce & McNab*.

Solicitor for respondent: *Gill*, Crown Solicitor.

IN COURT.

LILLEY, C.J.

{ June 2nd, 1890.
{ August 15th, 1890.

QUEENSLAND LITHOGRAPHIC PROCESS CO. v.

McKELLAR.

Practice—Interim injunction—Undertaking as to damages.

The practice of the English Courts, of requiring an undertaking for damages in granting an interlocutory injunction, as in *Graham v. Campbell*, 7 Ch.D., 490, followed.

ACTION for damages and an injunction.

Motion for interim injunction, restraining defendant from carrying on business as a lithographer or engraver, in terms of a covenant between the parties.

On the sale of a business, in which the defendant had a share, to the plaintiff company, in June, 1889, the defendant covenanted not to enter into business as a lithographer or engraver, either alone, or in co-partnership or association with, or as servant or manager for, any other person or persons in Brisbane, or within 100 miles thereof, until after 28th June, 1899. He had since acquired a share in a business known as the Brisbane Lithographic Company. Defendant denied being in partnership, and stated that he was a servant of the mortgagee, Bernhard Goldsmith, on a salary.

Sir S. W. Griffith, Q.C., and Lilley with him, appeared on behalf of the plaintiffs; and *Real*, for the defendant.

Griffith: Plaintiffs were clearly entitled to an injunction. Cited *Jones v. Hemens*, 4 Ch.D., 686; *Dales v. Weller*, 18 N. Rep., 993; *Baxter v. Lewis*, 81 L.T., 295; *Palmer v. Mallett*, 36 Ch.D., 411.

Real, contra, cited *Allen v. Taylor*, 39 L.J., Ch. 627, on app. 19 Weekly Rep., 35.

LILLEY, C.J.: The injunction will go as moved, until the hearing of the action or until further order.

Real asked that the plaintiffs should be ordered to give an undertaking as to damages.

Griffith cited, as to practice, *Kerr, Injunctions*, 3rd Ed., pp. 27-28, 627, and the cases of *Graham v. Campbell*, 7 Ch.D., 490, and *Smith v. Day*, 21 Ch.D., 424.

LILLEY, C.J.: This seems a new rule and a wise one in the English Courts, and I will follow it. Let the plaintiffs give the usual undertaking as to damages.

On 15th August, on motion for judgment, upon the plaintiffs waiving their claim to damages for breach of the covenant, His Honour gave judgment by consent for an injunction, as claimed, with costs.

Solicitors for plaintiffs: *Hart & Flower*.

Solicitors for defendant: *Unmack & Fox*.

INSOLVENCY.

IN COURT.

LILLEY, C.J.

9th July, 1890.

Re SIMONSEN.

Insolvency Act, (38 Vict., No. 5), s. 169—Certificate of discharge—Consent of creditors—Fraud or Collusion.

An insolvent, at the expiration of three years from the date of adjudication, after obtaining the consent testified in writing of a majority of the creditors, is, in the absence of fraud or collusion, entitled to a certificate as of right under section 169 of the *Insolvency Act*. A mere general allegation of fraud is not sufficient; specific acts must be proved.

By the term "majority of creditors" is meant a majority in number, and not in value.

Counsel for a creditor in the insolvency has no *locus standi*, the trustee being the representative of the creditors.

APPLICATION for a certificate of discharge.

Lilley, for the insolvent, applied for a certificate of discharge under sec. 169, *Insolvency Act*.

Pain, for Edward Naumberg, a creditor in the estate, appeared to oppose.

Lilley submitted that counsel for a creditor had no *locus standi*.

LILLEY, C.J.: The trustee is the representative of the creditors. It would never do to allow each creditor to appear.

Pain: I understand the trustee consents to represent the creditor, as Naumberg represents a majority in value. We allege fraud and collusion.

LILLEY, C.J.: A general charge of fraud is not sufficient; specific acts must be proved. By the term "majority" is meant a majority in number, and not in value.

Lilley: The insolvent is entitled to his discharge as of right. The application under this section is formal, as the clause is absolute.

LILLEY, C.J.: It is a very bad principle that the majority of the creditors should be able to consent to the discharge of the insolvent. The insolvent has already been refused his certificate by the Court. I think our Act is defective in this section. There are men who, I think, ought never

to be allowed to enter into trade in the community. I think there is a class of commercial offences that ought to be, so far as the Court is concerned, beyond the granting of a certificate. We ought not to be required to give some men certificates. I say nothing about the facts of this case, because I do not know what they are. If this is an absolute injunction on the Court to grant a certificate, with the consent of creditors, after three years, I of course have no option, and must obey the Act of Parliament. At the same time I must say a revision of the Insolvency law of this country is very desirable, and might be highly beneficial to the interests of trade and common honesty. Section 169 seems imperative on the judge; after three years, it seems, the creditors cannot interfere, unless fraud or collusion is proved. In one sense all consent may be said to be collusion. I cannot quite understand the meaning of that part of the proviso, but I see nothing in it to prevent the Court granting the certificate after the majority of the creditors have consented. My other refusals were under the previous and different sections. Here I think I am constrained by the Statute, and I see nothing to prevent him having his certificate, unless you can prove some particular act of collusion. I am bound by the letter of the Statute. The certificate is granted.

Solicitors for the insolvent: *Lilley & O'Sullivan*.

Solicitors for the trustee: *Thynne & Goertz*.

IN CHAMBERS.

LILLEY, C.J.

11th July, 1890.

In re WILLIAM CONGREVE MACINTOSH CONGREVE.

Insolvency Act of 1874 (38 Vict., No. 5), sec. 44, subsec. 3—Creditors' petition—Departure of debtor out of colony and remaining out of colony.

PETITION by C. R. Wilsone, by his solicitor, as his attorney, for adjudication of W. C. M. Congreve, on the ground that, while indebted to the petitioner in the sum of £6,352 5s. 2d., amount of a judgment and costs, he committed an act of

insolvency, namely, with intent to defeat and delay his creditors, departed out of the colony and remained out of the colony.

His solicitor had full powers of attorney to enforce the said judgment by any process of law, and to petition for adjudication of any person indebted to him.

The evidence of the judgment debtor's act of insolvency was that, after the trial of the action in which the petitioning creditor obtained the said judgment, Congreve left Queensland and had not since returned. He instructed his solicitors to appeal from the findings and judgment on the trial of the action; this they did, and the appeal was heard after his departure from Queensland, and was dismissed with costs. A writ of *fi. fa.* issued against him, but no return was made within six months, and the judgment remained unsatisfied, except as to £274 15s. 4d. recovered by garnishee proceedings. Prior to his departure Congreve had not paid his own solicitors the full amount of their costs, but early in 1889 they received a bank draft from him for the balance due, but he did not inform them of his address. His solicitors were not aware of his present whereabouts. Wilsone's Scotch solicitors were communicated with, and had informed petitioner's solicitors that they had learnt of Congreve's presence in the United Kingdom, but that they were unable to recover anything on the judgment, of which a memorial, with other documents, had been forwarded them.

HIS HONOUR held that there was sufficient evidence to support the application under section 44, subsection 3, and made the adjudication.

Solicitors for petitioner: *Thynne & Goertz*.

LILLEY, C.J.

14th July, 1890.

In the Matter of THE LIQUIDATION OF THE AFFAIRS OF JAMES GREEN, OF ROMA.

Liquidation—Proof of debt—Preferential claim by mortgagee in possession for wages of debtor's servants for three months prior to liquidation.

The Q. N. Bank were mortgagees of G.'s sawmill, and took possession on 22nd March, 1890. G. filed a petition in liquidation, and a trustee was appointed on 19th May following. G.'s workmen having sued the Bank and recovered the amount of six months' wages owing at the date of taking possession, the Bank which had continued working the sawmill, put in, as a preferential claim against the debtor's estate, a proof of debt for the workmen's wages for three months prior to the date of liquidation. The trustee rejected the proof. On appeal—

Held, that the Bank was entitled to prove as a preferential claim only for so much of the three months' wages as were earned prior to their taking possession.

MOTION by the Queensland National Bank, Limited, creditors of the liquidating debtor, that T. A. Spencer, of Roma, the trustee of Green's estate, be ordered to admit the Bank's proof of debt to the extent of £201 7s. 8d. as a preferential claim, under sec. 143 of *The Insolvency Act of 1874*.

The Bank was mortgagee of a sawmill, plant and machinery, under a bill of sale from Green in favour of the Bank. On default to pay moneys secured thereby, after demand duly made, the Bank took possession on 22nd March, 1890. The Bank, as mortgagee in possession, was sued by several of Green's workmen for wages due for six months immediately preceding the date of taking possession, and judgment was given against the Bank in each case. The Bank paid the judgments. It had continued to work the sawmill, and now claimed as a preferential debt the sum of £201 7s. 8d., being the total amount of the wages of each of the servants who had obtained judgments for the three months preceding the date of the appointment of a trustee in the liquidation proceedings—19th May, 1890. The trustee swore that the amount paid in wages by the Bank for the debtor, during the three months immediately preceding the appointment of a trustee, was £52 10s. 1d.

Lilley, on behalf of the Bank, moved for an order to admit the proof of debt as a preferential claim.

Byrnes, for the trustee: The trustee would admit as an ordinary claim. The Bank claimed up to the liquidation in May, though it had taken possession in March. It was entitled to recover

for so much only of the wages as were owing before possession was taken; not up to the date of liquidation. Sec. 2 of *The Wages Act* was explicit. By taking possession the mortgagee brought that Act down on his head, and became agent for the mortgagor; he was not a surety for him. The three months prior to 19th May began 19th February, and the liability of the debtor's estate to the mortgagee was for only the wages paid by him between 19th February and 22nd March, namely, £52 10s. 1d.

Lilley: The Bank claimed to be a statutory surety only for payment of the wages, and to be entitled as such surety to be placed by the trustee in the same position as the workmen, whom it had been compelled to pay. *Ex parte Gee*, 1 Glyn & Jam., 380; and *Ex parte Rushworth*, 10 Ves., 414. The mortgagor may take back the estate after possession by the mortgagee. The latter is a trustee for the former. If only the claim for £52 10s. 1d. be admitted, still the Bank was entitled to costs.

LILLEY, C.J.: The mortgagor ceased to be liable upon possession being taken in March, and the Bank had a preferential claim then. But the Bank is claiming up to liquidation: that is too much. I think its position must be determined by the date of taking possession, when the relation between the mortgagor and workmen as master and servants ceased. As to the Bank being surety for the debtor, a surety cannot be required to pay more than the principal is liable for. When the Bank had taken possession it was working the estate for its own benefit; it was itself under *The Wages Act*. Looking at secs. 3 and 4, I think the liability of the mortgagee begins with possession. Before that the mortgagor is liable in full; after possession the men were entirely the servants of the Bank. Sec. 143, sub-sec. 3, says, "three months next before the date of" liquidation. For such of that three months as had run up to the date of the Bank taking possession the men were entitled to be paid in full, and the Bank to prove as a preferential claim.

Solicitors for Bank: *Hart & Flower.*

Solicitors for trustee: *Chambers, Bruce & McNab.*

IN COURT.

LILLEY, C.J., J.O.

{ 5th June, 1890.
{ 16th July, 1890.

ELFVETSON v. ELFVETSON AND TRONSON.

Practice—Divorce—Wife's necessary costs, as between solicitor and client, paid by petitioner and added to his costs against co-respondent.

In a suit for divorce for adultery the jury found for petitioner, with damages against co-respondent. A decree *nisi* was granted, with costs against the co-respondent, including such costs as the judge should order petitioner to pay respondent.

On the question whether the wife is entitled to costs as between party and party, or as between solicitor and client—

Held, that the wife is in the same position as her husband, and she may incur such reasonable and extra costs as between solicitor and client as are absolutely necessary for the defence of her position as wife.

Held, the wife's solicitor must bring in his bill for taxation as between solicitor and client for all costs, and not first for party and party costs, and afterwards, by an extra action, recover costs, as between solicitor and client, from the husband. Costs, as between solicitor and client, or of the wife's solicitor, as between solicitor and client, must be charged and taxed on the strict footing of necessities.

The costs, when taxed on this basis ordered to be added by petitioner to his own costs, and recovered from co-respondent.

Motions for petitioner's and respondents' costs of suit.

On trial, the jury found in favour of the petitioner, that respondent and co-respondent had committed adultery, and gave £2,250 damages.

On motion on behalf of the petitioner for a decree *nisi*, and judgment for the amount of the damages with costs against the co-respondent, including costs payable by petitioner to respondent, to be taxed as between solicitor and client, counsel for the respondent asked that all her costs, taxed as between solicitor and client, be paid by petitioner.

Real and *Lilley* appeared on behalf of the petitioner; *Power* and *Manfield* for the respondent; and *Sir S. W. Griffith, Q.C.*, and *Byrnes* for the co-respondent.

In granting the decree *nisi*, LILLEY, C.J., Judge Ordinary, ordered that the petitioner have all his costs against the co-respondent, including such costs as he might be ordered to pay to the respondent.

On 16th July, His Honour delivered the following judgment as to the respondent's costs:—

The first question is, what costs the wife is entitled to as against the husband, and the second is, whether I should make an order for the payment of the wife's costs as against the co-respondent—the adulterer? I said that I would grant what costs the husband had to pay to his wife, and would grant his costs against Tronson. The only question I reserved was upon what scale they were to be taxed—that is, whether they should be taxed as between party and party, or whether as between solicitor and client. It is quite clear that under all circumstances in divorce the husband has to pay the wife's costs. She is supposed to be without money, and she has to instruct a solicitor to defend her position as wife, and whatever costs she reasonably incurs, the husband has to pay. The question is, can a husband say to his wife, "You are only entitled to costs as between party and party?" It is quite clear to me that other costs may be necessary—the costs as between solicitor and client—costs which the Court does not allow to parties fighting as opponents. The wife, in fact, is in the same position as the husband. She may incur such reasonable and extra costs as between solicitor and client as are absolutely necessary for her defence; just as the husband, although he recovered a fixed allowance as against the opposite party, might incur certain expenses for the furtherance of his suit, but which he could not recover from the opposite party, and which he nevertheless must pay to his solicitors. The wife is certainly entitled to take a position such as this: "That is necessary to my defence; I am not to be limited to the costs as between party and party?" In England—at all events, there is one instance of it being done—the solicitor could charge the costs as between party and party, and then by an extra action recover the costs as between attorney

and client. I find nowhere that the solicitor is bound first to tax his costs and then get them from the husband, and then bring an action, and put the husband to extra expense. He might do that, but I am very doubtful whether if he neglected to tax costs as between attorney and client, he would be allowed costs of the action to recover them. I think the rule ought to be what I stated on the previous day—that the solicitor must bring in his bill for taxation as between solicitor and client, and have all his costs settled by one proceeding. It would be quite foreign to the principle of law to allow a man to make a division of costs first as between party and party and recover from the husband, and then waste the husband's substance for the recovery of costs as between solicitor and client. To allow that would be reducing law to absurdity, or rather to cruel oppression. Therefore, what ought to be done in all these cases should be, the solicitor to bring in his bill as between solicitor and client and his other costs, and recover them all at the same time. Costs as between solicitor and client, or the costs of the wife's solicitor as between solicitor and client, must be charged and taxed on the strict footing of necessities. She is not to be allowed to indulge in the luxuries of litigation which a suitor might at his own cost. She is not to be allowed to oppress her husband by great and unnecessary expense. She must have only what is reasonably necessary to make her defence. In this case that will be the rule of taxation as against the husband, and the costs having been taxed on that basis, I will allow him to add them to his own costs and recover them from the co-respondent Tronson by execution. That will be the rule of the Court. I can give no judgment on the question of settlement, because I do not know what will be the balance for settlement after the damages have been recovered. I give leave to apply again to the Court.

His Honour referred to the following cases: *Ottaway v. Hamilton*, 3 C.P.D., 898; *Suggate v. Suggate*, 1 Sw. & Tr., 497; *Wells v. Wells*, 1 Sw. & Tr., 308; *Pearce v. Pearce*, 22 W.R. 69; 29 L.T., 458.

Solicitors for petitioner: *Bernays & Osborne*, agents for *Tobzer*, Gympie.

Solicitors for respondent: *Thynne & Goertz*.

Solicitors for co-respondent: *Chambers, Bruce & McNab*, agents for *F. I. Power*, Gympie.

AUGUST SITTINGS OF THE FULL COURT.

In re The Stamp Duties Act of 1866 AND The Stamp Duties Amendment Act of 1876, AND in re THE STAMP DUTIES PAYABLE ON CERTAIN MEMORANDA OF TRANSFER FROM JOSEPH LISTER TO THE QUEENSLAND NATIONAL BANK, LIMITED.

Stamp Duties Act of 1866, and Stamp Duties Act Amendment Act of 1876—Duty payable on transfer of equity of redemption from mortgagor to mortgagee for nominal consideration money, and a release from the mortgage debt.

In April, 1881, L. mortgaged certain land to the Q. N. Bank for £325, and further advances and interest; and afterwards mortgaged another portion of land to secure a sum of £50, and further advances and interest. Further advances were made amounting to £1,100. Stamp duty was paid on the amount of the original mortgage advances—£375. No stamp duty had been paid on £1,100. In March, 1890, L. executed three transfers of the mortgaged lands to the Bank, for the nominal consideration of £1 in each instance; and in April, the Bank gave him a release from the mortgage debt of £1,466 12s., in consideration of that amount, and of the transfer to the Bank of his equities of redemption in the mortgaged lands, made by him in the preceding month. No stamp duty had been paid on the deed of release, and the Bank had tendered the transfers to be stamped as for a nominal consideration. The Commissioners demanded payment of duty on £1,100 further advances of mortgage money. On appeal from the Commissioners' decision by the Bank—

Held, that stamp duty must be paid on the true consideration for instruments, and that the Commissioners are bound to enquire into the actual transaction, so far as needful to ascertain the amount of consideration money, and to assess the amount of duty legally payable.

Held, that these transfers were conveyances of L.'s interest in the lands, and were made not for a nominal consideration, but for the moneys advanced by the Bank and owing by him, and for the release, and stamp duty was payable on the amount of £1,100, as fixed in the schedule, under the title "Conveyances."

Appeal dismissed with costs.

SPECIAL case stated by the Stamp Commissioners at the request of the solicitors for the Queensland National Bank, Limited, to enable them to appeal against the determination of the Stamp Commissioners in the matter of Joseph Lister to the Queensland National Bank, Limited.

On the 6th day of April 1881 one Joseph Lister of Roma plumber in consideration of the sum of £325 advanced to him by the Queensland National Bank Limited mortgaged to the said Bank all those pieces or parcels of land described in Certificates of Title Nos. 54,258 54,259 and 53,578 situated in the County of Waldegrave Parish of Roma Portion 188 and being part of Selection 116 as also the land described in Certificate of Title No. 58,167 being resubdivision 1 of subdivision 2 of allotment 10 of section 34 situate in the County of Waldegrave Parish and Town of Roma and thereby covenanted to repay to the said Bank the said sum of £325 within twenty-four hours after demand made in writing for payment of the same together with interest thereon at the rate of £10 per centum per annum also such further and other sums costs charges and expenses &c. as should be advanced or paid by the said Bank to for or on his account and interest thereon as therein mentioned.

On the 4th day of October 1886 the said Joseph Lister executed a further and other mortgage to the said Bank over all that piece of land described in Certificate of Title No. 34,264 New Title No. 26,620a of allotment 6 of section 34 in the County of Waldegrave Parish and Town of Roma to secure the repayment of the sum of £50 with interest thereon after the rate for the time being charged by the said Bank upon overdrawn accounts Also such further or other sums costs charges and expenses as should be advanced or paid by the said Bank to for or on his account and interest thereon as in the said last-mentioned mortgage is mentioned.

On the 2nd day of April 1889 the said Queensland National Bank Limited by a certain release under the hands of F. H. Hart and Boyd D. Morehead two of the Directors of the said Bank and the hand of E. R. Drury the General Manager of the said Bank and under the Seal of the said Bank in consideration of the sum of £1,466 12s. being the amount in which the said Joseph Lister was therein stated to be then indebted to the said Bank and secured by the two several Bills of Mortgage hereinbefore referred to and in further consideration of the said Joseph Lister transferring to the said Bank the Equities of Redemption of him the said Joseph Lister in the said lands which transfer was effected by the execution of three several transfers by the said Joseph Lister in favour of the said Bank and dated respectively the 8th day of March 1890 the said Bank released the said Joseph Lister his heirs executors administrators and assigns and his estate and effects from all sums of money accounts contracts agreements covenants bonds actions proceedings claims and demands which the said Bank then had or might at any time thereafter have against the said Joseph Lister by reason of his said indebtedness.

On the 10th of April 1890 the said three transfers were submitted to the Stamp Commissioners by Messrs. Hart & Flower as Solicitors for the said Bank who claimed that the three several transfers in favour of the said Bank should be stamped 7s. 6d. each or for nominal consideration only the consideration money mentioned in each of such transfers being the sum of £1.

On the 23rd April 1890 the Commissioners informed the said Messrs. Hart & Flower by letter of that date that they required to be produced for their inspection the mortgages by the said Joseph Lister in favour of the said Bank together with a declaration setting forth the largest amount which had been advanced to the said Joseph Lister by the said Bank on the securities aforesaid.

Messrs. Hart & Flower disputed the right of the Commissioners to call for the production of the mortgages to the said Bank and also their right to call for a declaration showing the largest amount which had been advanced by the said Bank to the said Joseph Lister under the mortgage securities referred to and have paid the amount demanded by the Commissioners under protest namely the sum of £5 10s. being 10 per cent. on £1,100 the sum advanced by the said Bank to the said Joseph Lister in excess of the two several sums of £325 and £50 respectively mentioned in the said mortgage securities on the amounts advanced to the said Joseph Lister at the dates of the respective mortgage securities as appears by the declaration of Charles James Maillard Munro a copy of which is appended hereto which sum the Commissioners determined was the amount payable on the further advances before the transfers were entitled to be stamped for nominal duty only and have requested the said Commissioners under the provisions of section 21 of *The Stamp Duties Act of 1886* to sign and state a case for the purpose of enabling them to appeal against the determination of the Commissioners on the question.

The Commissioners submit that they are entitled to demand and receive duty on the further advances made by the Bank to the said Joseph Lister to the extent of the said £1,100 as no duty whatever has been paid on that sum and they contend that if the said Joseph Lister had been simply receiving a release of the said mortgages from the Bank he would have been required to show what sum had been advanced to him by the said Bank over and above the amount stated in the said mortgages and to pay duty on such amount before he would be entitled to have such release stamped at the amount fixed by the schedule to the Stamp Act and the Commissioners refer to the said schedule and to the heading in such schedule under the title "Mortgages."

The Commissioners further submit that the Bank being the purchasers of the equity of redemption of the said Joseph Lister in the lands included in Lister's mortgages to the Bank and in the transfers from Lister to the Bank can only claim to have such transfers stamped for nominal duty when the full duty has been paid on such mortgages and that to enable the Commissioners to arrive at the correct amount of duty payable on such mortgages it was necessary to call for a declaration showing the largest amount advanced by the said Bank to Lister and to assess

the duty thereon accordingly that being the true consideration money for the transfers of Lister's equity of redemption in the property to the said Bank and refer to the schedule to the said Act under the heading "Conveyance" and to paragraph 12 under such heading commencing "Where lands &c. sold subject to mortgage &c."

This matter had been argued before the June sittings of the Court, *Sir S. W. Griffith, Q.C.*, and *Lilley* with him, appearing for the appellant Bank, and *Real* for the Commissioners.

Owing to the death of Mr. Justice Mein, during the vacation, the matter was set down to be re-argued at the present sittings. Mr. Justice Real, having been counsel for the Commissioners, did not act.

Sir S. W. Griffith, Q.C., A.G., and *Lilley* with him, appeared for the Bank; and *Byrnes, S.G.*, for the Commissioners.

Griffith, Q.C.: There was a conveyance of the equity of redemption to the mortgagee for a nominal consideration. Contemporaneously a release of the mortgage debt was executed; this was not stamped. Stamp duty had been paid on the mortgages, as required in the Act, p. 2395, *Pain & Wool. Statutes*, which read, "provided the stamp duty on such mortgage as aforesaid has been duly paid." The *Stamp Duties Act* made no provision for further advances. This instrument did not come under the heads, "Mortgages, releases or transfers of mortgages." The duty of 15s. on further advances, under Schedule 2 of the amending Act, had been paid. There was no provision for stamping it afterwards. Cited *Marquis of Chandos v. Commissioners of Inland Revenue*, 6 Exch. R., 464; *Wale v. Commissioners of Inland Revenue*, 4 Exch. Div., 270. The Legislature had not dealt with this particular case in either Act.

Byrnes: The Act of 1866 covered this case. The duty charged here was on the amount actually due, over the original mortgage, at the time of conveyance of the equity of redemption. Referred to Schedule, "Conveyance," and secs. 20 and 21. The question was whether the Bank should not pay, as on a conveyance, under the last paragraph—P. & W., 2396. Not having paid the mortgage debt,

Lister must pay the consideration money. The duty should be on the conveyance for the amount of advances since the original mortgages.

Griffith, Q.C., in reply: Duty was not payable on the substance of the transaction, but on the instrument—sec. 3 of Act of 1866. The duty to stamp when the mortgage was made had been discharged. This transfer was under sec. 19 of *The Real Property Act of 1877*. There was no provision for paying any more duty on a mortgage than the original amount; the only further duty was on the transfer or release.

C.A.V.

The following was the judgment of the Court, delivered on 14th August:—

LILLEY, C.J.: This is a special case, stated by way of appeal, on behalf of the Queensland National Bank, Limited, from a decision of the Stamp Commissioners, and the question for our decision is whether any, and, if any, what stamp duty is payable on certain transfers executed by one Joseph Lister in favour of the Bank. The facts are few, and may be shortly stated:—On the 6th April, 1881, Lister borrowed of the Bank a sum of £325, to secure which sum, with further advances and interest, he mortgaged to the Bank several parcels of land. On the 4th October, 1886, Lister borrowed of the Bank a further sum of £50, and, to secure that sum, with further advances and interest, he mortgaged to the Bank another piece of land. Further advances were made, presumably against both securities, as we see nothing in the case to show any several advance against any one or more of the parcels of land as distinct from the other or others. These further advances amounted at last to the sum of £1,100. The stamp duties were paid on the original mortgage advances of £325 and £50. No stamp duty has been paid on the further advance of £1,100, and the Stamp Commissioners claim payment of it now under the following circumstances:—On the 8th March, 1890, Lister, being indebted to the Bank on the mortgages in a sum of £1,466 12s., executed three several transfers of the lands, in each instance for an alleged nominal consideration money of £1.

On the 2nd April, 1890, the Bank gave him a deed of release from the mortgage debt of £1,466 12s. This deed of release is curiously stated to be given by the Bank in consideration of the money (£1,466 12s.) which their debtor then owed them, and not in consideration of anything he had paid them, which would be the natural consideration for a release. It is, however, further stated in this deed of release that it is made "in further consideration of Lister transferring to the Bank the equities of redemption of him, the said Joseph Lister," in the mortgaged lands, which transfer was effected by the three several transfers of the 8th March, 1890, by Lister in favour of the Bank. The lands had in fact been transferred prior to the giving of the release. No stamp duty has been paid on this deed of release. The Bank, however, has presented to the Commissioners the three transfers to be stamped as given for a nominal consideration. The Commissioners, however, demand payment of the duty on the £1,100 further advance of mortgage money. It was claimed by the counsel for the Bank in his reply that the Commissioners had not to look at the substance of the transaction, but only at the instrument tendered to be stamped. We cannot accept this statement of the Commissioners' duty. We think the stamp duty must be paid on the true consideration for the instruments, and that the Commissioners are bound to enquire into the actual transaction, so far as may be needful to ascertain the amount of consideration money, for the purpose of assessing the amount of duty legally payable by the person tendering the instrument to be stamped. It is said that the three transfers which have been tendered for stamping disclose no consideration on which *ad valorem* duty can be charged—that it is payable only on the £1 nominal consideration in each instrument. The *Stamp Act* requires that "the purchase money or consideration shall be truly expressed." Now, the transfers being conveyances of Lister's interest in the lands, what was the true consideration or purchase money for which they were made? It is clear that the transfers were made to the Bank not for

any nominal consideration, but for the moneys which Lister had up to that time received by way of advance from the Bank, and probably for the release which he was to receive from the Bank. He did a few days afterwards receive the release. The deeds, although not dated on the same day, were doubtless contemporaneously arranged for and agreed to between the parties. The transfers by Lister are for the moneys owing by him to the Bank, and for the release; and the release by the Bank is for the transfer of the lands. There is in truth but one real foundation for the two instruments—the mortgage transactions between Lister and the Bank. The Bank then became a purchaser from Lister. Now the transfers are the first instruments executed and tendered to be stamped, and the duty chargeable on them is clearly stated in the schedule, under the title "Conveyance"—"And where any property shall be sold and conveyed, in consideration wholly or in part of any sum of money charged thereon, by way of mortgage or otherwise, and then due and owing to the purchaser . . . the amount liable to the *ad valorem* duty imposed by this Act shall be the amount of such portion of the purchase or consideration money as shall be over and above the amount of any mortgage as aforesaid: provided that the stamp duty on such mortgage as aforesaid has been duly paid." Here the stamp duty on the mortgage had been paid to the extent of £375, but not on the £1,100. The Commissioners, therefore, demanded payment of the duty on this further sum (being the balance of the mortgage debt of £1,466 12s., deducting the amount £375, on which duty had been paid) before they would stamp the transfers. We think that the stamp duty payable is fixed under the head "Conveyance," and that the Bank's appeal must be dismissed with costs.

Solicitors for Bank: *Hart & Flower.*

Solicitors for Commissioners: *Gill, Crown Solicitor.*

THE MINISTER OF JUSTICE (ON THE RELATION OF
HAWKINS) v. THE SHIRE OF WINDSOR.

*Highway—Local Government Act of 1878, 42
Vict., No. 8, sect. 237—Permanent obstruction of highway.*

W. Shire Council resolved to divide a certain road for some distance down its middle, into a high and a low level road, by cutting down half of its width, viz., 33 feet to a depth of 4 feet, and for the safety of passengers, to erect a fence along the edge of such cutting, and to thus maintain the road for an indefinite period, thereby obstructing the public right of highway across the said road. The Council admitted that the construction was intended to be permanent.

Held, that such obstruction of the use of the road was unauthorised by the *Local Government Act of 1878*, and illegal.

DEMURRER by defendants to plaintiff's statement of claim, in an action for an injunction restraining defendants from obstructing a public highway.

The following are the pleadings, which, with the judgment of the Court, contain the essential facts:—

STATEMENT OF CLAIM.

1. The plaintiff is Her Majesty's Minister of Justice for the Colony of Queensland. The relator Thomas Sampson Hawkins the younger resides at the Albion near Brisbane in the said Colony on a portion of land abutting on the public highway hereinafter mentioned and is the registered proprietor under *The Real Property Acts of 1861 and 1877* of allotments 65 66 67 68 69 and 73 of subdivision 1 of portion 193 in the Parish of Enoggera in the County of Stanley in the said Colony abutting on the said public highway.

2. The defendants are the Corporation of the "Windsor Shire Council" The Shire of Windsor is a municipality duly established under the provisions of *The Local Government Act of 1878*.

3. From the twenty-third day of August 1883 and thenceforth to the present time there has been and of right ought to be a common and public highway called Bellevue Terrace separating allotments 60 61 62 63 64 65 66 67 68 69 and 73 of the said subdivision 1 in the said Colony from allotments 87 86 85 84 83 82 81 80 79 78 and 74 of the same and over which said highway all persons could and of right were entitled during all the times aforesaid to pass and re-pass and to have access to the said allotments on foot or with horses cattle and carriages at all times of the year at their free-will and pleasure.

4. In the year 1887 the defendants passed a resolution that the said public highway be fenced down the centre and the lower part formed and the defendants have ever since threatened and intended and still threaten and intend unless restrained by order of this Honorable Court to obstruct the said public highway by erecting longitudinally down the centre of the said public highway a permanent

fence commencing midway between allotments 73 and 74 of the said subdivision 1 and ending at a point midway between allotments 64 and 83 of the same and by cutting down and forming a portion of the said public highway extending longitudinally from a point opposite allotment 74 of the said subdivision 1 to a point opposite allotment 83 of the same and laterally 33 feet being one-half the width of the said public highway to a depth of 4 feet or thereabouts lower than the remaining portions of the said public highway and by permanently leaving such said remaining portion in its then condition as a high level road.

5. By reason of the premises serious injury has been is still being and will be caused to the relator and to the owners and occupiers of the other lands abutting upon the said highway and to the other inhabitants of the said Shire of Windsor and all other persons desiring to use the said highway.

The plaintiff claims:—

1. An order of this Honorable Court restraining the defendants from obstructing or continuing to obstruct the said public highway called Bellevue Terrace by erecting or permitting to remain thereon a fence or otherwise obstructing the free passage of persons passing over and along the said highway or any part thereof.

2. Such further and other relief as the nature of the case may require.

STATEMENT OF DEFENCE AND DEMURRER.

1. The defendants do not admit that the works or levels or the fence in the Statement of Claim mentioned were or are intended by them to be permanent.

2. The defendants say that the cutting down and formation of the public highway in the Statement of Claim mentioned in the manner complained of by the plaintiff are works intended to be executed by them in the exercise of the powers in that behalf conferred upon them by *The Local Government Act of 1878* and for the purpose and in the course of constructing the said highway in the safest and most convenient manner for the advantage and benefit of the inhabitants of the said Shire of Windsor.

3. The defendants further say that the fence complained of by the plaintiff is intended by them upon such construction of the said highway as aforesaid to be erected for the purpose of the safety and protection and that the same will be absolutely necessary for the safety and protection of all persons using the high level portion of the said highway whether on foot or with horses cattle or carriages.

4. The defendants deny all and every the allegations contained in paragraph 5 of the Statement of Claim.

The defendants also demur to the plaintiff's Statement of Claim and say that the same is bad in law on the ground that the acts and matters therein complained of are within the lawful power and authority of the defendants under and by virtue of *The Local Government Act of 1878* and on other grounds sufficient in law to sustain this demurrer.

This demurrer had been argued before the Court, composed of LILLEY, C.J. and MEIN, J., at its June Sittings, and judgment was reserved.

Owing to the death of His Honour Mr. Justice MEIN, before the judgment of the Court had been delivered, the case was re-argued before LILLEY, C.J. and REAL, J. at the August Sittings.

Byrnes, S.G., appeared on behalf of the relator; and *Sir S. W. Griffith, Q.C., A.G.*, and *Rutledge* with him, for the defendants.

Griffith: Defendants proposed to divide the road lengthwise down its centre into a high level and a low level road, and, to protect people from falling over from the one to the other, proposed to put a fence along the road between the two. The ground of the objection to this was that it was an unlawful permanent obstruction of the highway. Defendants claimed to be entitled to keep the road in that condition for an indefinite period, as long as it was necessary; and said it was their business, not a jury's, to decide how to make a road. Defendants' contention was that the Legislature had left it to the local authorities, and not to juries, to judge whether those obstructions were necessary. It was a sufficient answer to the alleged obstruction of the streets for defendants to show that what they were doing fell under the head of "construction of streets." *Local Government Act of 1878*, sec. 237; *Lewis v. Weston-super-mare Local Board*, 40 Ch.D., 55. It might or might not be expedient to have two levels on this road, but that was in defendants' discretion. It was a mode of construction sometimes necessary, and it was not therefore unlawful. There were several instances of such roads in Brisbane. The Court could not draw the line between expediency and inexpediency. There would be endless confusion if this question went to a jury, and the Court would have to tell them what was permanent, and what an obstruction, and so on. Every alteration of a road must inconvenience someone; it was a question of degree, and that was a matter for the local authority. Referred to *Hobbs' case*, Q. L. Reps., 58.

Byrnes: Taking the facts in the statement of claim as true, the road in question was passable before this obstruction, and defendants must show it was warranted by some Act of Parliament.

Did *The Local Government Act of 1878* give defendants authority or power to do what they had done? Sect. 237 gave them no such power. By the *Toowong case*, 1 Q.L.J., 170, there was no power to diminish the width of a road. There was diminution here. Again, was there power for them to divide a road into two, and to be absolute judges of whether it was an obstruction, or necessary? *Reg. v. Sweeney*, 8 Supr. Ct. Reps., N.S.W., 128. Permanency was what was chiefly complained of here by plaintiff. *Reg. v. United Kingdom Electric Telegraph Co.*, 3 F. & F., 73; *Reg. v. Train*, 3 F. & F., 22; *Re v. Ward*, 4 Ad. & E., 405; *A.G. v. Terry*, 9 Ch. App., 423; and *McBride's case*, 2 Q.L.J., 73, at p. 75. The right of highway plaintiffs claimed was the unquestionable right to cross the highway.

Griffith: If this act was unlawful, defendants failed; but if it might be lawful, then it was for defendants to judge whether it was a necessity or not. Strictly, the putting up of something that might prevent a man crossing a road by some one line, such as a tree, a fountain, a statue, or a shelter for passengers, would be unlawful; then, too, a yard or two of fence would be unlawful. If not, then where did unlawfulness begin? It was a question of degree, how many yards of fence might be put up. Who was to judge of it? Defendants said the local authority should.

C.A.V.

On the 14th of August, the judgment of the Court was delivered by LILLEY, C.J., as follows:—

This is an action for an injunction against the Windsor Shire Council to restrain them from obstructing a public highway called Belle Vue Terrace. The statement of claim alleges that in the year 1887 the Council passed a resolution that the highway be fenced down the centre and the lower part formed, and that they have ever since threatened and intended, and still threaten and intend, unless restrained, to obstruct the public highway by erecting longitudinally down the centre of the said public highway a permanent fence, and by cutting down and forming a portion of the said public highway long-

itudinally between certain points and laterally 38 feet, being one-half the width of the highway, to a depth of four feet lower than the remaining portions of the highway, and by permanently leaving the remaining portion in its then condition as a high level road. Whether an allegation that a public corporate body has "passed a resolution" to do a certain work is a sufficient cause of action, it is not necessary to enquire, for the Council have in their demurrer pleaded that the *acts* complained of are within the lawful power and authority of the Council by statute, and, indeed, the whole argument has proceeded on the assumption that the work has been completed and is to remain a permanent portion of the formation of the public highway,—that there is no present intention to alter it, either now or hereafter. We have considered the case, therefore, as one of alleged permanent obstruction of the highway. The Council contend that the facts set out in the claim do not sustain the allegation that this is an obstruction of the highway.

If this is so, there must be judgment for the Council, or, if it is not apparent on the face of the claim, it must go to trial to determine the question, not as a question of conflicting engineering opinions as to the best mode of making the road, for with such questions the Court could not interfere, but on the plain issue whether the work complained of is a permanent deprivation of any part of the public right of highway. At common law the right of public highway extends lengthways and sideways over the whole length and breadth of the highway, and the enjoyment of this right can only be restricted by statutory authority. It is admitted that the public can pass and re-pass along the 38 feet lower formation on this road, but if they attempted to cross the whole width of the original highway of 66 feet, they would meet an impassable elevation of 4 feet with a fence at the top, where these so called lower and higher roads have been formed. Thus an obstruction of the passage from one side to the other of the 66 feet highway has been created by the work of the Council, and to that extent the public right of

highway has been restricted. The defence is that this is merely a question of degree and is entirely within the authority of the Council under the statute,—that, although it is a permanent work, it is not an obstruction of the right of highway. It is not contended that the Council has any lawful power or authority to permanently obstruct the highway. In the course of the necessary making of public roads there must be some temporary obstruction; and hindrance arising from that, or from a temporary suspension of work on a road through failure of means, would probably give no cause of action against the Council, unless it were a public nuisance or dangerous. And under the *Local Works Loans Act of 1890*, sec. 6 subsec. 5, loans may be granted for "roads properly cleared, &c., and formed not less than half a chain wide at formation level," but there is nothing in the statute by way either of express or implied authority to the Council to retain that as the permanent condition of the road or highway. It is the alleged permanency of this work in the Windsor Shire which makes it unlawful if it is obstructive of the right of highway. Now, what authority has the Council under the statute in respect of roads? The highway is allocated either by the Government or by a dedication to the use of the public by some private owner of land. By the *Local Government Act of 1878* (sec. 237), the Council "have the care, construction and management of all public highways, &c.," and they "may alter or increase the width, or cause to be raised or lowered, the ground or soil of any road, and may, for such time as may be necessary for that purpose, close such road." By secs. 246 and 247, it is obvious that the highway is the road on the level fixed by the Council, either of its own motion or on being required to do so by any person interested in property abutting on the street. No question of an alteration of the width of the road arises in this matter; it is merely one of obstruction—admitted to be permanent—and the terms of the section just quoted show that the legislature contemplated a temporary stoppage of the road for the purposes pointed out by the section itself. In

so far as it might be necessary for construction, there is, as we have said, by the very necessity of the thing, a power of temporary obstruction. The examples of higher and lower roads mentioned during the argument do not support the Council's contention. The roads which branch off to the wharves—say, at Howard Smith's; at the Queen's Wharf, William Street; and at the wharf near this court-house—are instances of necessary approaches to the wharves by means of narrower ways from roads of full width. The original highway is in each instance undiminished, and there is no obstruction on it. Then an instance is mentioned of three or four roads in the Bight, where it has been found impracticable to give each road its full width. The law does not demand impossibilities, and when any question arises with reference to those roads it will be time enough to consider and determine it. No difficulty of that kind is pleaded here. There may be a breach of the law there, but, if so, it will not justify local authorities elsewhere in similar conduct, nor can we sustain it by a decision of this Court. The case of *Hobbs v. the Municipality of Brisbane* was strongly relied on for the Council. In that case the Corporation made the highway, and, in doing so, left the plaintiff's house on a precipice, without any approach to the highway. He sought to recover damages which he certainly had sustained in the depreciation of his property. We decided that the Corporation had authority by Statute to make the road, and as the Act gave no right to compensation, the plaintiff could not recover. There was no obstruction of the highway itself, and the Corporation was not required by law to make roads or approaches to the highway from adjacent properties. The statement of claim in this case shows an obstruction of the use of the half of the road between the two points therein mentioned. As that is admitted to be a permanent state of construction, there is a ground for relief, and the demurrer must be over-ruled with costs. Judgment accordingly for the plaintiff.

Solicitor for plaintiff: *Long*.

Solicitors for defendants: *Hart & Flower*.

PEACE v. THE SHERIFF OF QUEENSLAND.

Fieri Facias—Priority of registration on land—Real Property Act of 1861, 25 Vict., No. 14, sec. 91—Sheriff's sale, and satisfaction of prior claim.

H., M. & Co. first, and plaintiff on a later date, delivered to the Sheriff writs of *fi. fa.* against W. & D. Plaintiff, after delivery, registered his *fi. fa.* in the Real Property Office against W. & D.'s lands. H., M. & Co. registered their writ on the land, some days later than plaintiff. The Sheriff then sold and conveyed under both writs, with notice from plaintiff that his *fi. fa.* had been registered first, and of his claim to priority thereby. Instead of satisfying plaintiff's claim, the Sheriff paid the proceeds of the sale over to H., M. & Co., whose *fi. fa.* was first delivered to him. Held, that plaintiff was entitled to the proceeds of the sale, as his writ had priority over H., M. & Co.'s in respect of the land.

FINAL judgment summons.

The circumstances were as follow:—On 5th March, 1890, Hertzberg, Millingen & Co. delivered a writ of *fi. fa.* to the Sheriff, commanding him to levy £47 3s. 9d., with interest, poundage, &c.—in all £49 19s. 3d.—in an action by them against Winslow & Dando. On 21st March the Sheriff levied on the goods of the defendants in the action, and realised £22 2s. 6d., and paid over to Hertzberg, Millingen & Co. £17 4s. On 25th March the plaintiff's *fi. fa.* for £34 1s., against the same defendants, was delivered to the Sheriff, and on 26th, the next day, it was lodged in the Real Property Office for registration on Certificate of Title No. 64,571, and was registered on 31st March. The plaintiff had discovered the land to be the property of the defendants in the action. Hertzberg, Millingen & Co.'s *fi. fa.* was produced at the Real Property Office on 14th April, and was registered 18th April, 1890, so that, although delivered to the Sheriff twenty days before plaintiff's, it was not lodged at the Real Property Office until nineteen days later than plaintiff's, nor registered until eighteen days later. On 14th May the Sheriff sold Winslow's land, and within an hour after the sale received a notice from Peace's solicitors, claiming the money on the ground that Peace's *fi. fa.* was first registered on

the land, and that there had been already a return of Hertzberg, Millingen & Co. This latter ground was incorrect, as the Sheriff had not made a return, but had held one sale under it, and the point was abandoned in argument. With this notice, the Sheriff kept the money four days, and then paid it over to Hertzberg, Millingen & Co. The question for the Court was whether the plaintiff's *fi. fa.*, being registered on the land first, and the Sheriff having notice of plaintiff's claim to priority, the Sheriff should pay over the money to Hertzberg, Millingen & Co.

Lilley appeared on behalf of the plaintiff, and *Byrnes, S. G.*, for the defendant.

Lilley: The sale was under both writs. The first enactment bearing on this question was *The Registration of Deeds Act*, 7 Vict., No. 16, sec. 21 (*v. Pring's Stats.*, vol. 2, page 1,229). A statement of the law was contained in *Williams v. Smith*, 2 H. & N., 443, in a *dictum* of Baron Martin. Referred also to *Harding v. Hall and others*, 10 M. & W., 42; *Mercantile Act of 1867*, sec. 3; the *Real Property Act of 1861*, sec. 91. The 21st section of the *Registration of Deeds Act* was repealed by the *Repealing Act of 1867*, and was re-enacted by sec. 45 of *Common Law Practice Act of 1867*, but, by sec. 8 of the *Repealing Act*, was not to affect the *Real Property Act of 1861*. The *Real Property Act* must therefore be dealt with as if passed after the *Common Law Practice Act*. Plaintiff had priority of Hertzberg, Millingen & Co. Referred to *Wormwall v. Young*, 5 B. & C., 660. Hertzberg, Millingen & Co.'s writ could not affect the land as against the plaintiff, under sec. 91 of the *Real Property Act*, unless it was on the register, and it was not on the register until eighteen days after plaintiff's. The Sheriff's duty, when two writs were delivered to him, was to see if they were registered on the land. There were similar cases under the *Registry Acts* in England, when writs were registered in the C. P. Office:—*Hughes v. Lumley*, 24 L.J., Q.B., 57; *Benham v. Keen*, 3, L.J., Ch., 129; *Neave v. Flood*, 33 Beav., 666; *Westbrook v. Blythe*, 23 L.J., Q.B., 386.

Byrnes: Defendant admitted that plaintiff's solicitors made their claim, but the Sheriff never admitted that claim. The question was whether Sheriff's law had suffered a change lately by the *Real Property Act*. The delivery of a writ to the Sheriff always bound the land. Under sec. 91, the law was altered only with regard to the persons described therein. There was no mention of the Sheriff in the *Real Property Act*. The Sheriff was bound to obey that writ which came to his hands first. The subsequent registration of the second writ delivered to him may have altered their position. If the Court decided against plaintiff under sec. 91, there is a change in Sheriff's law. The first writ bound the land, and the Sheriff was bound to satisfy that first writ. He had partly executed it; other persons gave him notice, it is true, but they took no steps to stop the sale, although they knew that he was going to sell, and that that was the practice of the Sheriff's office. They lost their rights by allowing him to go on. His duty was to sell, not to inquire into priorities elsewhere.

Lilley, in event of judgment for plaintiff, asked for costs, under the *Sheriff's Act of 1875*.

LILLEY, C.J.: This is an application by the plaintiff in this action against the Sheriff of Queensland for judgment, which I referred to the Court for its consideration, because it was represented to me that an important question arose as to the position of creditors under the *Real Property Acts*. It may be that the *Real Property Act*, with subsequent changes in the law with respect to registration and registries, has cast on the Sheriff a burdensome amount of duty not hitherto fallen upon his shoulders, but the Sheriff is an officer of the law, and is bound to know the law, and, I presume, does know it. Occasionally questions crop up which even the judges themselves find difficulty in solving. There is apparently no blame attachable to the Sheriff here; he appears to have followed the customary routine of his office. Other cases might arise on which a different decision, upon a different state of circumstances

from those before us to-day, might be given. But, confining ourselves to the law and the facts before us now, the matter appears to have arisen in this way. Hertzberg, Millingen & Co. appear to have delivered to the Sheriff a writ of execution, by which he was authorised to sell the land and goods of the defendants. That writ ordinarily would take priority of all others coming in. Peace, the plaintiff, afterwards delivered his writ to the Sheriff, and he took the precaution which Hertzberg, Millingen & Co., the first creditors, neglected; he registered his *fi. fa.* in the Real Property Office. It appears to me clearly that that gave Peace's writ a priority over the writ of Hertzberg, Millingen & Co. in respect of the land. The Sheriff might have sold under Hertzberg, Millingen & Co.'s exclusively, but he could only have done so subject to the right of Peace to have his writ reserved as a charge on the land, or to have it satisfied out of the sale under Hertzberg, Millingen & Co.'s writ. Peace registered his writ, gave the Sheriff notice thereof, claimed to have priority, and requested him to sell. The Sheriff then, having both writs in his hands, proceeded to sell, and sold, and has conveyed under both of these writs. He has, therefore, in respect of the land, extinguished the writ of Peace, who was on the registry. The Sheriff having the proceeds in his hands, Peace's solicitors then claimed to have his writ first satisfied. The Sheriff, instead of satisfying the claim of Peace, and then applying the proceeds, as far as they would go, to Hertzberg, Millingen & Co.'s claim, disregarded the former, and, instead of satisfying Peace's claim, applied the money to Hertzberg, Millingen & Co.'s. By doing that he added largely to the value of the property to other persons, and he deprived Peace of the fruits of his execution. The Sheriff may do that, but, if he does, he will be in the position of other persons who commit trespasses; he or the Government must pay for it. Instead of paying the money to Peace, he paid it to someone else. Therefore judgment must go against the Sheriff for the amount claimed, with costs.

REAL, J.: I have nothing further to add. Looked at in any possible way, the property was sold free from Peace's execution. It, therefore, was worth the amount of Peace's execution more than the interest of the judgment creditor, and that execution was a charge on it. The Sheriff received the money free from Peace's execution, and has paid it away to someone else. It is clear that Peace is entitled to it. Therefore judgment must go.

Solicitors for plaintiff: *Atthow, Bell & Stumm.*

Solicitor for defendant: *Gill, Crown Solicitor.*

LILLEY, C.J.

30th July, 1890,

AND AUGUST SITTINGS OF FULL COURT.

GORRIE v. GOLDSMITH.

Practice—Cross-examination upon affidavits in support of new trial—Depositions of deponents for Full Court taken and certified by the Registrar—Granting of new trial on ground of fresh evidence.

Upon the cross-examination and re-examination of deponents as to matter in their affidavits filed in support of a motion for a new trial, which had been ordered to be taken after the granting of the rule *nisi*, the Registrar must take the depositions and certify them, for the use of the Full Court along with the affidavits in respect of which they had been taken.

Affidavits can be filed on both sides on a motion for a rule absolute for new trial on the ground of discovery of fresh evidence, though only to establish the probability of a change in the result of trial, not to establish the truth of the facts. The sole question to be decided on the motion is whether there is a probability of the new evidence inducing the second jury to upset the verdict of the first jury.

THE plaintiff obtained a verdict and judgment in the action at the civil sittings of the Supreme Court in May, 1890.

The only question for the jury had been whether the signature to a receipt was the signature of the plaintiff.

The defendant obtained, at the June sittings of the Full Court, a rule *nisi* for a new trial of the action, on the ground of discovery of fresh evidence. The rule *nisi* was granted on affidavits of the defendant and one Papst, who swore to the nature of the fresh evidence.

On 25th July, 1890, *Byrnes*, for the plaintiff, obtained at Chambers an order under O. LVII., r. 6, for the cross-examination and re-examination before the judge of the deponents named, and of any others on either side whose affidavits should be filed in reference to the alleged new evidence.

On 30th July, 1890, *Byrnes* appeared on behalf of the plaintiff, to cross-examine the defendant's deponents; and *Lilley* to cross-examine the plaintiff, who had filed an affidavit in reply.

LILLEY, C.J., in directing that the Registrar should take the depositions of the witnesses, said: The practice is convenient. The evidence is to be received here as in an action, by cross-examination and re-examination on the affidavits sworn. It is to be used by the Full Court. Necessarily the evidence taken here must be presented to the Full Court in addition to that of the affidavits, and the Registrar must certify to that evidence taken here for the use of the Judges in the Full Court. My notes are not matter to go before the Full Court: a judge does not certify to his notes. I think this is a convenient practice, and it is the course we will take here.

The fresh evidence alleged to have been discovered was that Papst had overheard plaintiff talking to a companion in a public room in a hotel, and that plaintiff had said, "I signed the damned receipt, but I do not know what was in it." This was a few weeks after Papst had landed in Queensland; he did not know plaintiff or defendant at the time, or anything about them. The name Goldsmith occurring in the conversation attracted his attention. He was employed by Goldsmith as gardener about twelve months later; and when he saw a report of the hearing of this action in the paper, he told Goldsmith that he knew something very important to him, and then went to defendant's solicitors, and told them the circumstances. Goldsmith corroborated Papst, except that he deposed to Papst having told him everything at the time. Their evidence was denied completely by the plaintiff. Another affidavit, by Wm. McKean, deposing to a conversation in a hotel between him and plaintiff on the occasion of their first meeting

with one another, on a day subsequent to the date of the granting of the rule *nisi*, was put in by *Lilley*.

Byrnes objected to its admission, and declined to cross-examine the deponent; he asked that his client's rights thereon be saved until the decision of the Full Court.

McKean deposed to an admission to him by plaintiff that he had signed the receipt [Ex. No. 4 in the action], "but I did not know exactly what was in it."

At the August Sittings of the Full Court,

Lilley and *Woolcock*, for the defendant, appeared to move absolute the rule *nisi* for a new trial; and *Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G.,* and *Power* with him, for the plaintiff, to oppose.

Lilley, after having read the affidavits of Papst and defendant, asked leave to read McKean's.

Griffith objected, on the ground that the affidavit had been sworn after the granting of the rule *nisi*, and it did not relate to the same matter as those of Papst and defendant. It should not be admitted. *Anderson v. Titmas*, 36 L.T., N.S., 711.

The affidavit was admitted and read, and the deponent's deposition, on cross-examination and re-examination before the Court, taken by the Registrar.

The depositions taken before The Chief Justice on 30th July were then read.

Byrnes tendered an affidavit by the plaintiff, in reply to McKean's, sworn that day.

Lilley objected; the question was whether there was a case on fresh evidence for a new trial, not whether the plaintiff could contradict defendant's evidence. He could find no authority for reading affidavits on that motion at all.

Griffith, as to affidavits, referred to *Chitty's Prac.*, 14th ed., 1,390. Practically the argument for defendant was that plaintiff had no right to be present, notwithstanding the primary rule of *audi alteram partem*.

LILLEY, C.J.: There is no reason why affidavits should not be filed by the plaintiff to prevent the

matter going to a second trial where it would be unnecessary. This affidavit ought to be read here.

Lilley, in support of the motion, cited *Norris v. Freeman*, 3 Wils., 38; *Broadhead v. Marshall*, 2 W. Bl., 955; *Thurtell v. Beaumont*, 1 Bing, 339; *Ansdell v. Ansdell*, 4 M. & Cr., 449 at 456; *Anderson v. Titmas*; *Egdin v. Horner*, 10 Vict., L.R., Law, 353.

Griffith: This was a case which seldom occurred, but there were rules to be discovered in the reported cases. Referred to *Tidd's Prac.*, 9th ed., 906; *Lush's Prac.*, 3rd ed., 631; *Chitty's Prac.*, 13th ed., 1,220; and *Broadhead v. Marshall*. Was there a high degree of probability that the second jury would believe the story of those new witnesses, assuming their evidence to go to the jury contradicted? The question was not whether the new evidence was true, but whether it was to be controverted, and whether it would strengthen the case as it had already been presented to a jury, and whether it was likely to induce the new jury to upset the verdict of the first jury. Reviewed *Norris v. Freeman*, *Thurtell v. Beaumont*, *Ansdell v. Ansdell*, *Egdin v. Horner*, and *Anderson v. Titmas*, cited for defendant, and cited *Dickinson v. Blake*, 7 Br. P.C., 177; *Weak v. Calloway*, 7 Price, 677; *A.G. v. Woodhead*, 2 Price, 3; *Ward v. Hearn*, 10 Vict., L.R., Law, 163; *Davies v. Brecknell*, L.R., 3 P. & D., 88; *Morley v. Smith*, 3 Aust. Jur., 108; and *Bartlett v. Pickersgill*, 4 East., 577 n. He then discussed the new evidence on its merits, and contended that the case was improbable and contradictory. On those grounds, the motion should not succeed; if a new trial were granted, it should be on the condition of the payment of the costs of the former trial, and of this application.

Power and Byrnes followed on the merits.

Lilley in reply, distinguished *Norris v. Freeman*, *Anderson v. Titmas*, and *Davies v. Brecknell*; and cited in addition, *Tilgymill v. Wharton*, 2 Vern., 378; and *Gibbs v. Hooper*, 2 M. & K., 353. The contention for plaintiff was that the Court should say Papst and McKean were not worthy of credit. Their evidence warranted the

granting of a new trial. As to the costs of the first trial, they should be costs in the action; *Daniell's Chancery Prac.*, 6th ed., 778. If defendant had to pay, and afterwards won the action on the new trial, he would be burdened with the first costs of an action which should never have been brought.

Woolcock followed on the merits.

Griffith referred to *Chitty's Prac.*, 1,220, and to the fact that defendant had presented a debtor's petition in insolvency to the Court.

LILLEY, C.J.: The question here is whether there is a probability of the new evidence inducing a new jury to upset the verdict of the first jury. I think Baron Cleasby went too far in *Anderson v. Titmas*; "conclusive" is strong language in regard to moral probabilities. Baron Huddleston's view is the right one. I certainly hold that affidavits can be filed on both sides on a motion of this nature, though only with a view to establishing the probability of a change in the result of the trial, but not to establish the truth or otherwise of the facts on such application. They must go before a jury for establishment. I will examine the exhibits again, for a reason I will not say anything about, and I will not, of course, canvas the facts in my judgment.

C.A.V.

On the 14th August following, judgment was delivered as follows:—

LILLEY, C.J.: I will do what I said I would do—abstain from any consideration or reflection on the facts, either on the old case, or on the statements for a new trial. I will grant a new trial, but upon condition that the defendant give security within one month after taxation in one or more sureties, to the satisfaction of the Registrar, for payment of the taxed costs of the first trial, or deposit in Court the amount thereof, to be paid to plaintiff should the defendant fail on the second trial. Should the defendant succeed on the second trial, then all the costs of the second, including those of the first trial, are to be costs in the action, to be paid to the successful party.

MR. JUSTICE REAL, who had been counsel for

the defendant Goldsmith, concurred in the judgment for conformity sake, to make it the judgment of the Court.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitors for defendant: *Chambers, Bruce & McNab*.

IN CHAMBERS.

LILLEY, C.J.

18th June, 1890.

In re CHARLES FRENCH, IN LIQUIDATION.

Liquidation resolution—Debtor's discharge—Delegation by creditors of power to grant discharge—The Insolvency Act, 38 Vict., No. 5, r. 236.

The Insolvency Act of 1874 gives no authority to creditors to delegate to anyone the power to grant a discharge to the debtor. They must exercise that power themselves.

Stumm (solicitor) moved for the issue of a certificate of discharge to the liquidating debtor, in accordance with a special resolution of the creditors passed at a meeting held by them on 8th April. The resolution was "that the granting of the certificate of discharge to the debtor be left in the hands of the trustee." Referred to r. 236, *Insolvency Act*, and to *In re Hope*, 9 Ch.D., 398.

LILLEY, C.J.: There is no authority in the Statute for creditors to delegate their power to resolve whether the debtor shall be discharged; they must exercise that power themselves, not delegate it. Motion refused.

Solicitors for liquidating debtor: *Atthow, Bell & Stumm*.

LILLEY, C.J., IN CHAMBERS. 18th June, 1890,
AND AUGUST SITTINGS OF THE FULL COURT.

SPARKS v. HARPER AND CO.

Practice—Insolvent plaintiff's trustee joined as plaintiff after entry of judgment—Trustee's disclaimer—Vacation of judgment.

The plaintiff in an action, after obtaining judgment, was adjudicated insolvent, and in due course received his certificate of discharge. His trustee filed a disclaimer

in the action. The defendants applied for leave to appeal to the Privy Council, and were refused leave. On the unopposed application of the trustee, his name was struck out of proceedings. On the subsequent application of defendants before the Full Court, the trustee's name was restored to the record and the judgment in the action vacated, with costs of the action to the defendants, on the condition that they undertook to recover their costs as a debt against the estate, and not against the trustee or the insolvent. Costs of the motion were also allowed both parties out of the estate, the trustee's in priority. Defendants were to have the amount of prior dividends paid in the estate; but the trustee must not disturb the dividends paid.

PLAINTIFF had obtained a judgment against defendants, with an injunction restraining the latter from using a label for "French Coffee," which the jury had found to be a fraudulent imitation of plaintiff's label.

The case is reported at 3 Q.L.J., pp. 158, 201, and *ante* p. 11.

Plaintiff afterwards was adjudicated insolvent, and had been granted his certificate of discharge.

On 18th June, 1890, *Feez* for the defendants, moved for leave to appeal against the verdict and judgment to the Privy Council.

Byrnes, for the trustee, opposed on the ground that, Sparks had gone insolvent, and had received his certificate; his trustee had disclaimed in the action.

HIS HONOUR refused defendants leave to proceed; and, on *Byrne's* application, ordered the trustee's name to be struck out of the proceedings, on the ground of disclaimer, with costs.

At the August sittings of the Full Court, the Court was moved to restore the trustee's name to the proceedings, as a plaintiff; and to vacate the judgment entered in the action in favour of the original plaintiff.

Sir S. W. Griffith, Q.C., A.G., *Feez* with him, appeared for the defendants; and *Byrnes, S.G.*, for the trustee.

Griffith: The motion was in the nature of an appeal from The Chief Justice's order at Chambers. The plaintiff was gone; and his trustee would not move; and defendants now appealed from the order striking out the trustee's name as

a plaintiff. Defendants could not do anything without the trustee being there, and they were entitled to have the judgment vacated.

LILLEY, C.J.: I will be glad to hear your authorities, although I am with you, as I was below. If the insolvent is gone, he must abandon the judgment. If the trustee says he will not go on, then you can ask us to get it out of your road and give you costs. If he will go on, then you have your right of appeal.

Griffith cited *Daniell v. Harding*, 1 Y. & Coll. Ch. Ca., 436; *Abbotson v. Greg*, 19 W.R., 340. Plaintiff's right was gone; *Jackson v. N.E. Railway Co.*, 5 Ch.D., 844; *Emden v. Carter*, 17 Ch.D., 768; *Warder v. Saunders*, 10 Q.B.D., 114. The existing judgment could not benefit anyone; the insolvent could not, and the trustee would not take it up. The order would be not to reverse, but to vacate the judgment.

Byrnes: The trustee must not suffer in regard to costs. Cited *United Telegraph Co. v. Bassano*, 31 Ch.D., 630. If costs were allowed, they should not disturb the previous dividends which had been paid in plaintiff's estate.

LILLEY, C.J.: The trustee's name must be restored. The judgment in *Sparks v. Harper* will be vacated; give defendants their costs, on their undertaking to recover them as a debt against the estate. They must have the prior dividend, if there is money to pay it, but the trustee need not disturb the dividend paid. Here there will be no personal results to Sparks; this concerns his estate alone. In *United Telegraph Co. v. Bassano*, it was without costs against the Official Receiver. Here they are to have their costs not against the trustee, or insolvent, but against the estate; they undertaking to prove for them against the estate, not otherwise. Let the judgment in the action be vacated; defendants to have their costs of action, including the costs of this motion, they undertaking to prove for them against plaintiff's estate, and not seeking to recover them otherwise.

Byrnes: As to costs of the motion, the trustee was struck out and defendants have brought him here. He should have costs of the application.

LILLEY, C.J.: It is convenient to have him here. Allow the trustee his costs of this motion out of the estate in priority.

Solicitors for trustee: *Chambers, Bruce & McNab*.

Solicitors for defendants: *Hart & Flower*.

REAL, J.

23rd July, 1890.

In re THE WILL OF JOHN HICKS, OF BALLARAT, VICTORIA, DECEASED, AND *In re* PETITION OF THE QUEENSLAND PERMANENT TRUSTEE, EXECUTOR, AND FINANCE AGENCY COMPANY, LIMITED.

Practice—Administration by Trustee and Executor Company as attorneys for Executors in Victoria—Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, Act, 1888, sections 3 and 11.

The Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, applied by petition for letters of administration with will annexed, as the lawfully constituted attorney of the Ballarat Executors and Agency Company, Limited, and Wm. E. Secomb, to whom probate had been granted in Victoria. The testator had left personal property in Queensland. Under sections 3 and 11 of *The Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, Act*, an order was granted as prayed.

THIS was an application that letters of administration of the estate of the deceased, John Hicks, within the Colony of Queensland, with exemplification of the will annexed, should be granted to the petitioning Company, as the lawfully constituted attorney of the executors named in the will. The executors were the Ballarat Executors and Agency Company, Limited, and Wm. E. Secomb, to whom probate of the will had been granted by the Supreme Court of Victoria. It appeared that the testator was entitled to personal estate in Queensland, and the executors being desirous of appointing some one in this colony to apply for letters of administration, with the will annexed, had appointed the petitioning Company their attorney.

The 11th section of *The Queensland Permanent Trustee, Executor, and Finance Agency Company,*

Limited, Act, authorises the petitioning Company to act under any power of attorney; and by the third section, the Company is authorised to apply for and obtain letters of administration, in all cases in which a private person may so apply. In *re Gillett's Trusts*, L.T., of 28th December, 1889, p. 152, was cited by *Byrnes, S.G.*, counsel for the petitioner, in which a firm of solicitors in London, was granted a vesting order on the petition of a Trustee and Executor Company, in Victoria, who themselves had received authority to act from the trustees appointed under the will. Order as prayed.

Solicitors for applicants: *Wilson, Newman-Wilson & Hemming*.

LILLEY, C.J.

15th August, 1890.

In the Will of JOHN FREDERICK MOLONEY,
DECEASED.

Practice—Trustee, Executor, and Agency Company as surety to bond of Administratrix—Treasury certificate of amount deposited by Company—Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, Act, 1888, secs. 8 and 10.

On an application to appoint the Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, as surety to the bond of an administratrix, the certificate of the Under-Secretary to the Treasury that £20,000 was invested in debentures under sec. 8 of *The Companies Act of 1888* was required before it could be accepted as a surety.

Chambers (solicitor) as attorney for Mary Moloney, widow, under power of attorney applied that the Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, be accepted in lieu of private parties as sureties to the bond to be given by her in this estate. Referred to *The Queensland Permanent Trustee, Executor, and Finance Agency Company, Limited, Act*, sec. 10.

The Registrar, who had referred the matter before the Judge in Chambers, was present.

LILLEY, C.J., said the Court must be satisfied as

to the financial position of the Company, and made the following order: Accept the Company as surety, subject to the filing of the certificate of the Under-Secretary of the Treasury as to deposit of debentures under the statute, sec. 8.

Solicitors for Executrix: *Chambers, Bruce & McNab*.

REAL, J.

26th September, 1890.

MUNICIPALITY OF ROCKHAMPTON v. RICHARDSON.

Valuation of land—52 Vict., No. 9, s. 2—Notice of appeal—Jurisdiction—Person aggrieved.

A ratepayer gave notice of his intention to appeal against a valuation under sec. 2 of *The Valuation Amendment Act of 1888*, but did not state that he thought himself aggrieved by the valuation.

The notice of particular valuation being given to such ratepayer as owner and occupier,

Held, that by necessary implication the ratepayer was taken to have thought himself aggrieved, and that the Justices had jurisdiction to hear such appeal.

Rex v. Justices of Essex, 5 B. & C., 41; *Rex v. Bond*, 6 Ad. & E., 905, distinguished.

Henley v. Hart, 4 W.W. & A'B., L., 162, followed.

APPEAL by way of special case from a refusal of the Police Magistrate at Rockhampton to hear an appeal from a valuation by the Municipality of Rockhampton.

The appellant had received a notice of valuation on certain land within the said municipality, and, desiring to object thereto, handed in a notice in writing under section 2 of *The Valuation Act Amendment Act of 1888*, stating that it was his intention by his solicitor to appeal, at the sittings appointed for hearing such appeals, against the valuation as per Notice of Valuation No. 279, in respect of allotments, &c.

The respondent objected that the notice did not state, nor could it be gathered therefrom by necessary implication, that the appellant thought himself aggrieved. The Police Magistrate held that he had no jurisdiction, and upheld the objection, and declined to hear the appeal.

Byrnes, S.-G., for the appellant, submitted that the technical objection could not be upheld.

The old cases on the matter were not followed in a recent case in Victoria, *Henley v. Hart*, 4 W.W. & A'B., L., 162. The notice of appeal implied that the appellant thought himself aggrieved.

Lilley, for respondents: All persons have not a right of appeal under this section. To give the Justices jurisdiction, the appellant must state that he thinks himself aggrieved. The notice is merely a notification of intention to appeal. The notice should state whether the appellant objects to the amount or the principle of the valuation. The authorities are all in favour of this construction. *Rex v. Bond*, 6 Ad. & E., 905; *Rex v. Justices of Essex*, 5 B. & C., 41; *Rex v. Inhabitants of Blackawton*, 10 B. & C., 792; *Rex v. West Riding of Yorkshire*, 7 B. & C., 678; *Corio Road Board v. Galletly*, Vict. L.R., 1 W.W. & A'B., L., 85.

His Honour thought that the notice of valuation No. 279, mentioned in the notice of appeal, could be read therewith, and proposed to send back the case for amendment.

By consent of counsel for the parties, the case was amended by inserting the notice of valuation, which identified the appellant as the occupier and owner.

REAL, J.: This is an appeal on account of a valuation. The appellant gave notice of appeal against a particular valuation, specifying the number of the valuation notice to which he objected, and the numbers of the allotments. The cases cited seem to me distinguishable, in as much as this is not a general rate. The only person interested is the individual, and if he is not aggrieved it is impossible for anyone else to be so. The Justices have to say whether he has proved that he is aggrieved. The case stated is defective, in as much as the notice of valuation is not incorporated; but, as the parties consent to an amendment, I will take the notice as part of the case. In that notice the appellant is identified both as the occupier and owner of the land valued, and consequently no one else could be aggrieved. Under the circumstances, I consider that by the

notice of appeal there was a necessary implication that the appellant thought himself aggrieved, and I remit the case to the Justices to hear the appeal on a day to be fixed. There will be no order as to costs.

Solicitors for appellant: *Daly & Schacht*.

Solicitors for respondents: *Rees R. & Sidney Jones*.

OCTOBER SITTINGS OF THE FULL COURT.

In the matter of GEORGE PATTEN ADAMS.

Solicitor—Admission of—Reg. Gen., 12th Dec., 1879—Service of less than five years.

An application for admission as a solicitor by a barrister, solicitor, proctor, and attorney of Tasmania, who was an Associate of Arts, and qualified by a local statute to admission there, after a service under articles for four years, refused; and the applicant ordered to serve another year and to pass the necessary examinations here.

The Court will look behind a certificate granted elsewhere, and order the full period of service before admission.

In re O'Brien, 3 Q.L.J., 99, followed.

Where the two professions of barrister and solicitor are indiscriminate in the applicant's country, admission as a solicitor only will be granted by this Court. Where the professions are separate, admission will be granted in the several capacity, if the applicant is otherwise admissible under the rules of the Supreme Court.

Lilley moved the admission as a solicitor of George Patten Adams, a barrister, solicitor, proctor, and attorney of the Supreme Court of Tasmania. Mr. Adams had not the certificate of the Board of Examiners for solicitors.

Rutledge for the Board, stated that in the face of *O'Brien's case*, 3 Q.L.J., 99, the Board had no alternative but to refuse the application for a certificate. Mr. Adams had obtained the degree of Associate of Arts, and served under articles for four years to the Solicitor-General of Tasmania, and thereby became entitled to admission under *The Legal Practitioners' Act* as a barrister, solicitor, proctor, and attorney. Mr. Adams now sought to be admitted here as a solicitor.

Lilley moved under rule 17 of *Reg. Gen.*, 12th December, 1879. *O'Brien's* case was distinguishable. The Court held there was an evasion in that case. Mr. O'Brien made two applications.

LILLEY, C.J.: I can't see how this case differs from that of *O'Brien*.

REAL, J.: Mr. O'Brien only did what the law allowed him. He was quite right in that.

LILLEY, C.J.: Yes, that case was not a decision merely on the ground of evasion. We have not extended a privilege which was granted to a local institution. Our rules may require revision, but that is a matter for future consideration. Mr. Adams may be admitted after service of another year, and must pass an examination. This may be taken to be a decision that in any country or colony where the two branches of the profession are indiscriminate, admission will be granted here only as a solicitor. If the branches are separate, then admission may be granted either as barrister or solicitor, if our rules allow it.

Re THE WILL OF MARY KELLY, DECEASED.

Will—Construction—Devisable interest—Period of vesting—Residuary estate.

M. K. by her will, devised to her daughter M. C. B., Charlemont House and its contents, until her granddaughter L. M. S., became 21, and then to the said L. M. S., for her own property. M. A. B. died when L. M. S. was 16 years of age, and by her will devised her interest, in the above property, to her daughter B. C., until L. M. S. became 21.

Held that the interest of L. M. S. did not vest till she became 21; and that M. A. B. had an estate till that period, and could devise the same till L. M. S. attained 21; and that B. C. was entitled to the rents and profits of Charlemont House, till L. M. S. became 21.

Quære, if L. M. S. died before 21.

PETITION for the opinion of the Court, on the construction of a will by the executors and trustees.

Mary Kelly, deceased, by her will bearing date 19th April, 1888, appointed James Landy and George Connolly, trustees and executors of the said will, and devised amongst other things not necessary to be herein set out, her residence known

as Charlemont House, and its contents, to her daughter Mary Ann Bolger, until her granddaughter Louisa Maude Stewart, attained the age of 21; and then the said residence and its contents, were to be delivered up to her said granddaughter, for her sole and separate property. Mrs. Kelly died on the 21st September, 1889, and Mrs. Bolger on the 28th March, 1890. Mrs. Bolger appointed the said James Landy and George Connolly, her executors and trustees, and bequeathed all her right, title, and interest, under Mrs. Kelly's will, to her daughter Blanche Clyde, and requested that the said Blanche Clyde should be allowed to occupy Charlemont House, free of rent and charge, until the said Louisa Maude Stewart became 21. Louisa Maude Stewart was 16 years of age at the date of Mrs. Bolger's death. The opinion of the Court was asked upon the following:—

1. How should the petitioners dispose of the furniture mentioned in the petition, and the rents of Charlemont House, since the decease of Mary Ann Bolger, until Louisa Maude Stewart attained the age of 21, if she lived to attain that age, or if she should die under that age?

2. If Louisa Maude Stewart should die under the age of 21, then upon what trusts would the petitioners hold the furniture and Charlemont House?

3. In what manner should the costs of the application be paid or provided for?

Pain for the executors and trustees, explained that the same persons were trustees under the will of Mrs. Kelly, and also that of Mrs. Bolger, and were therefore doubly interested. Mrs. Bolger's interest lasted till Louisa Maude Stewart was 21, and was an estate till a certain time. An estate *pur autre vie* was devisable by 31 *Vic. No. 4*, sec. 36. The greater includes the less, and *a fortiori* Mrs. Bolger had a right to devise her interest, and Blanche Clyde was entitled to the use of Charlemont House and its contents, during the remainder of the period.

Lilley for David Galloway Stewart, guardian of Louisa Maude Stewart, and Mary Margaret

Stewart, beneficiaries under the will of Mrs. Kelly. The interest of Louisa Maude Stewart vested *instantly* on the death of Mrs. Kelly, but not indefeasibly. It was liable to be divested if she did not reach 21. *Jarman on Wills*, 809; *Andrew v. Andrew*, 1 Ch.D., 410; *Thurston v. Austey*, 27 Beavan, 335; *Ridgway v. Ridgway*, 20 L.J., Ch., 258; *Gotch v. Foster*, L.R. 5, Eq., 311. Mrs. Bolger had a life estate by implication.

Wilson for Ellen Bolger, the representative of the residuary legatees appointed by the Court. Louisa Maude Stewart was not entitled to enjoy the rents and profits of Charlemont House, till she attained 21. The words "and then" in the will, were equivalent to "as soon as." There was no word to shew that Mary Ann Bolger's representatives were considered.

REAL, J.: There is nothing to shew they were not considered. Mrs. Bolger had an user. Is it not a term?

Wilson cited *Jarman*, (4th ed.) 651, 313; *Fearne's Contingent Remainders*, 543; *Re Jobson*, 44 Ch.D., 154. If Louisa Maude Stewart was not entitled till she attained 21, and Mrs. Bolger had no devisable interest, the residuary devisees were entitled to the rents and profits.

LILLEY, C.J.: If Mrs. Bolger's interest was in the nature of an estate, she would have some disposing power with regard to it if it was not to determine with her life. If it were to terminate with her life, it went to the residue or vested immediately in the person to whom it was absolutely given. It seems to me, looking at the peculiar nature of the will, especially to the use of the word "estate," and the subsequent mention of the "Charlemont Estate," that it was a gift to Mrs. Bolger until Maude Stewart attained the age of 21, when it divested from Mrs. Bolger, and vested in Maude Stewart as her property. It being an estate of whatever nature, it was devisable by the will, and Mrs. Bolger had devised it by her will. It would not therefore fall into the residue; it would go according to the provisions of Mrs. Bolger's will, until Maude Stewart attained

the age of 21. She would take her interest, but in the meantime it would go subject to the provisions of Mrs. Bolger's will. Costs to all parties, as between attorney and client, allowed out of the estate. The Court will not consider such a sad contingency as Miss Stewart's death, the presumption being in favour of life.

REAL, J., concurred.

Solicitors for trustees: *Bunton*.

Solicitors for D. G. Stewart: *Lilley & O'Sullivan*.

Solicitors for residuary-devisees: *Wilson, Newman-Wilson & Hemming*.

GORRIE v. GOLDSMITH.

Practice—New trial—Setting aside order absolute—Former judgment restored.

An order absolute for a new trial had been granted, subject to the defendant giving security for or paying into Court before a certain date, the amount of taxed costs of the previous trial.

On failure by defendant to comply with the said conditions, an order was made setting aside the rule absolute, and the prior judgment was consequently restored without an order.

Byrnes, S.G., applied to set aside an order absolute for a new trial, on the ground that the conditions subject to which the order had been granted, had not been complied with, and for an order restoring the former judgment, and the relief thereby given. The defendant's solicitors admitted service of the notice of motion.

LILLEY, C.J.: The order is set aside. The order *nisi* for a new trial being now gone, there is no need for an order restoring the prior judgment, which stands. The defendant must pay the costs.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

HARRIES v. MARTIN.

*Practice—Jurisdiction of Northern Court—
The Supreme Court Act of 1889, section
11—Appeals from northern judges—Motions
for new trial.*

By section 11 of *The Supreme Court Act of 1889*, 53 Vict., No. 17, which confers upon the northern judges within the northern district, all the jurisdiction of the Court "except jurisdiction on appeal from a decision of a judge of the Supreme Court," general powers are given; and an extended construction should not be put on the words "appeal from a decision of a judge." If two constructions of those words are possible, the limited construction is the proper one. As the law stood before the Act, appeals were always dealt with in various Acts and rules of Court, as matters coming from a judge alone, and as distinct from new trial motions. The Northern Supreme Court is excluded by this section from hearing an appeal from the decision of a judge sitting alone, or where he has directed a jury to find a verdict for either party, or where he has entered judgment on admitted facts upon motion,—the jury having been discharged. In all other cases, where there is a mixed function of judge and jury, and in all applications for a new trial, the proceedings should be taken before the Northern Supreme Court.

APPEAL from an order of the Northern Supreme Court discharging a rule *nisi* for a new trial.

The action was brought on two promissory notes, made by one Damke, in favour of defendant, and endorsed by defendant to plaintiff. The defence was that defendant endorsed as surety for Damke, and took a bill of sale over his stock and furniture, which plaintiff had sold to him. The promissory notes were in part payment. One promissory note was dishonored, whereupon plaintiff took possession of defendant's security and sold it. Defendant set up the value of the security as a counter-claim, and pleaded a discharge by it in the original action. The action was tried before Mr. Justice Cooper and a jury, at Normanton. Plaintiff's counsel at the trial, asked the judge to direct a verdict for plaintiff; but His Honor declined to do so, and left the case to the jury. The jury without retiring, found a verdict for plaintiff, and judgment was entered accordingly.

Defendant moved the Full Court at Townsville for, and obtained on 10th June, 1890, a rule *nisi* for a new trial, on the grounds that the verdict

was against weight of evidence, and that it was excessive; or in the alternative, to enter judgment for the defendant on the counter-claim. On 8th September following, the Full Court discharged the rule *nisi* on the ground that Mr. Justice Cooper had given a decision in the case, and, by doing so, had put the appeal beyond the jurisdiction of the Northern Court. They held that, under section 11 of *The Supreme Court Act of 1889*, which gave them all the jurisdiction of the principal Acts, except "on appeal from a decision of a judge of the Supreme Court, whether a northern judge or not," they could not hear the appeal.

Sir S. W. Griffith, Q.C., A.G., Lilley with him, appeared on behalf of the appellant—the defendant below; *Byrnes, S.G., Gore-Jones* with him, for the respondent—the plaintiff below.

Griffith: The Act of 1889, must be taken to have been framed with reference to the known practice as to appeals at the time. The distinction in the English Courts was that when the judge had given a wrong decision on a point of law, the appellant must go to the Court of Appeal; if there had been a joint decision of judge and jury, he should go to the Divisional Court; *Elty v. Wilson*, 3 Exch. D., 359; *Yetta v. Forster*, 3 C.P.D., 437. It was impossible to discover here anything that Mr. Justice Cooper decided. The Northern Court should hear the motion for a new trial.

Byrnes: The motion before the Northern Court was for much more than a new trial; in the alternative, defendant asked that judgment be entered for him.

REAL, J.: Is this an appeal as distinguished from a new trial, as we have been used to employ the terms in this Court? There is a distinction throughout the rules under *The Judicature Act* between new trials and appeals.

Byrnes: "Appeal" was applied to both in O. 57, r. 6a; and if the Northern Court were debarred from hearing part of a rule, they were debarred from hearing all. The judge had refused to enter judgment for the plaintiff. There were several

forms of relief asked before the Court at Townsville; one was that judgment should be entered for the defendant. In the past, an appeal was brought on the Equity side, and a new trial motion on the Common Law side of the Court; now, under *The Judicature Act* and this statute, either could be obtained on an application for the other. They had been careful to provide for different sets of circumstances in England. The rules were not the same here. When a judge entered a judgment on the findings of a jury, it became his decision; and section 11 meant that the Northern Court should not exercise appellate jurisdiction, where one of its members was concerned in any sense, but that such matters should be dealt with by this Court.

Gore Jones followed.

The judgment of the Court was delivered by—

REAL, J.: The first question to be decided here is, whether this word "appeal" in section 11 is to cover everything, as the Solicitor-General put it, in the nature of an objection to any judgment of the Northern Court, in which any one of the Northern judges happens to be concerned. If it does, the contention of the Solicitor-General is correct. On the other hand, if that construction is put upon it, then it will cover many matters with reference to which the judge has formed no opinion whatever, and has not entered into any consideration of. As pointed out by the Attorney-General, there are many cases in which new trials are asked for where there has been no decision by the judge, where the opinions of the judge might have been quite opposed to the judgment actually given, which may have been entered according to the finding of the jury, although such finding was against the evidence, and the damages were excessive. That being the case, the question is, what construction shall we put upon "appeal." Section 11 says—

Subject to the provisions in this Act contained, the Northern judge shall, within the Northern district, have and exercise all the jurisdiction, powers, and authority of the Court, as conferred by the principal Acts, except jurisdiction on appeal from a decision of a judge of the Supreme Court, whether a Northern judge or not.

A general power is given here, but the word appeal is used to limit that power, and we think that an extended construction should not be put upon the word "appeal"; and that, if there is a possibility of putting two constructions on this word, the limited construction is the one to put upon it. As the law stood before this Act was passed, appeals were always dealt with, in various Acts and in rules of Court, as something distinct from new trial motions; and they are always spoken of as matters coming solely from the judge. The cases cited by the Attorney-General show the distinction clearly. There the rules specifically provide for these things; but the existence of those rules and our own rules show the distinction between the two applications, by way of appeal and by way of application for new trial. It is true as pointed out by the Solicitor-General that, by O. XXXIX, r. 10, the same relief can practically be given on an application for new trial as on appeal. Still, that does not make the proceeding an appeal. Here the proceeding appears to have been before judge and jury; there is nothing in the evidence before us of a direction having been given; and there is nothing to show what part the judge may have taken in the trial. The matter went to the jury generally, and they gave a verdict generally for plaintiff. It remained for the judge simply to enter judgment according to that verdict.

A rule may ask for something more than is necessary. This rule *nisi* asks specifically that judgment be set aside, and for a new trial, on the grounds that the damages are excessive, that the verdict is against evidence and the weight of evidence, and on the ground of surprise—all matters with which the judge could have no concern. As argued by the Solicitor-General, it is necessary to give section 11 of the Statute such a construction as will either include these matters, and preclude persons from going on these grounds alone before the Northern Court, or otherwise to take the construction contended for by the Attorney-General, and allow them to come there on all matters involving a motion for new trial. We

think the latter the proper construction, and that the word "appeal" is used in this section in the same sense as it has been used among the profession, and as used in *The Judicature Act* and rules, and is not intended to cover cases where a trial has been before judge and jury, and where a motion is made in the nature of a motion for a new trial, but applies to those cases where a trial has been before a judge alone, and the appeal is from the judge's decision; and in all such cases, as when the judge has directed the jury to find a verdict for either party; or where, upon motion for judgment upon admitted facts, the jury being discharged, the judge has entered judgment. There the judgment would be solely the decision of the judge, and, in that case, the jurisdiction of the Northern Supreme Court would be excluded by section 11. In all other cases, where there is a mixed function by judge and jury, and the decision is not solely that of the judge, we think the proceedings should be before the Northern Supreme Court, and that all applications for a new trial, where a judge and jury are concerned, should be before the Northern Supreme Court.

LILLEY, C.J.: I concur. The appeal is allowed with costs. Remit the rule *nisi* to the Northern Court for hearing.

Solicitors for appellant (defendant below):
Chambers, Bruce & McNab, agents for *Roberts & Leu*, Townsville.

Solicitors for respondent (plaintiff below):
Macdonald-Paterson, Fitzgerald & Hawthorn, agents for *Selwyn Smith*, Townsville.

NOVEMBER SITTINGS OF THE FULL COURT.

PALMER v. MUIR AND OTHERS.

In re JOHN WATSON, DECEASED.

Will—No evidence of survivorship of husband or wife—Presumption as to real estate under The Titles to Land Act, 22 Vict., No. 1, sect. 26—As to personalty, English rule applied.

Testator and his wife were drowned at sea, at night, through the foundering of their vessel in less than

five minutes, after striking a sunken rock in deep water. There was no evidence as to survivorship. The only evidence forthcoming, was that of a survivor, who saw testator fall into the water, and saw testator's wife standing on deck for about one minute afterwards. Upon a suggestion that an issue might be tried by a jury as to survivorship, the Court declined to direct a trial, on the ground that, there was no evidence to go to them.

The Court then dealt with the questions arising out of the will. Testator was five years older than his wife, who died intestate. There was no issue. On the presumption established by *The Titles to Land Act*, sect. 23, in respect of realty, the wife, being the younger, was presumed to have survived. In respect of personalty, the English rule followed.

Special case stated by consent for the opinion of the Court pursuant to the Rules of the Supreme Court, Order XXXIV.

1. John Watson late of Brisbane in the Colony of Queensland stationer deceased by his last Will and Testament dated the 9th January 1890 appointed the defendants James Muir and Josiah Young (hereinafter called the Trustees) Trustees and Executors of such Will and devised to his wife Elizabeth Selina Watson his land in South Brisbane being allotments 6 and 7 of section 11 with the house and the contents thereof absolutely and the residue of his real and personal estate the said Testator devised and bequeathed to the Trustees upon trust to pay to his said wife out of the first moneys that should come into their hands the sum of £10,000 and directed that the said sum of £10,000 should be a first charge upon his Estate after the payment of his funeral and testamentary expenses. Then as his Estate should become realised the said Testator directed that a sum of £5000 should be paid to his sister the defendant Margaret Norman. And upon the complete realisation of his said Estate the said Testator directed the Trustees to pay the residue thereof to his said wife. And after reciting as the fact was that the said Testator was engaged in co-partnership with James Ferguson of Brisbane in a business of a stationer the said Testator directed the Trustees in their discretion either to carry on the said business or cause the same to be carried on under their inspection and control or to discontinue the same and as soon after his decease as the arrangements of the said business would allow to get in and realise the balance which should be found to be due to his estate on account of his share of the debts which at the date of the decease of the said Testator should be owing to him and his said co-partner after deducting from the amount of such debts the working expenses of the said business and other claims and demands due therefrom up to the date of his death and all other moneys owing to him on account of the said business and out of the moneys so realised as aforesaid to pay the sums before mentioned. But the said Testator gave power to the Trustees should they consider it advantageous to his estate either to withdraw a part only of the Testator's capital from the said business or to sell his interest in the

said business when ascertained to any person or persons and upon such terms as to payment as they might deem most expedient and hold the proceeds of such sale upon the trusts before mentioned. And the said Testator directed that if the Trustees elected to carry on the said business they should until the payment of the said sum of £10,000 pay to his said wife for her maintenance the profits of the said business arising from the said share. And it was by the said Will further provided that if the Testator's said wife should predecease him then the Testator devised and bequeathed the whole of his real and personal estate to the Trustees upon trust as to his said business to exercise the discretion before given to them and to hold all moneys realised from his estate upon trust to pay to the defendant Margaret Norman the sum of £10,000 such sum to be a first charge upon his estate after the payment of his funeral and testamentary expenses and upon further trust as his estate should become realised to pay to the plaintiff Mary Palmer £3000 to James Gray £3000 to the three children of his sister Elizabeth Eadie in equal shares the sum of £1000 to Edward James Burke £1000. And to pay the residue of his estate to the defendant Margaret Norman. And the said Testator provided for the payment of the said legacies to the children of any legatee who might have died in his lifetime leaving issue living at his decease and for payment of interest upon legacies in the event of the Trustees electing to carry on the said business and declared that the interest of any female under his said Will should be for her sole and separate use.

2. The said testator and his wife Elizabeth Selina Watson were passengers in the s.s. "Quetta" which foundered at sea on the 28th day of February 1890 and the said testator and his said wife were both then drowned under the following circumstances that is to say—The said steamship was proceeding on her voyage when she struck on a sunken rock and sank in deep water in less than five minutes after striking. Neither the said testator nor his said wife was ever afterwards seen alive by any survivor from the said wreck and no evidence can be procured to show whether the said Testator in fact survived his wife or his said wife survived him.

3. At the date of the death of the said Testator and his said wife he was of the age of 59 years and she was of the age of 54 years.

4. The said Testator had no issue.

5. The said Elizabeth Selina Watson died intestate and administration of the real and personal estate of the said Elizabeth Selina Watson deceased was on the 16th day of October, 1890, granted by this Honourable Court in its Ecclesiastical Jurisdiction to the plaintiffs the Queensland Permanent Trustee Executor and Finance Agency Company Limited.

6. The plaintiff Mary Palmer is the sister and one of the next of kin of the said Elizabeth Selina Watson at the time of her death and by order of His Honour Mr. Justice Real duly made on the 20th day of October 1890 it was ordered that the plaintiffs should represent the next of kin of the said Elizabeth Selina Watson deceased in this action and in this special case. The defendant

Margaret Norman is the sister and either the sole next of kin or one of the next of kin of the said Testator.

7. The said Testator was at his death entitled to the land at South Brisbane described in his Will and thereby devised to his said wife.

8. The parties are not aware whether the said Testator was at his death entitled to any other lands in the said Colony.

9. Part of the assets of the partnership business in which the said Testator was engaged in co-partnership with the said James Ferguson consisted of land but the contract of partnership contained no express stipulations relating to such land or the interests of the several partners therein. The said land was acquired by the said partnership after the said contract had been entered into. The profits and losses of the business were to be divided and borne by the partners in equal shares.

10. Questions have arisen as to the devolution of the real and personal estate of the said Testator under the circumstances hereinbefore set forth.

The questions submitted for the opinion of the Court are—

1. Does any presumption of law arise as to the order in which the deaths of the said Testator and his said wife took place.
 - (a) As to the Testator's real estate?
 - (b) As to the Testator's personal estate?
 - (c) As to the land forming part of the assets of the said partnership.
2. Are the next-of-kin of the said Elizabeth Selina Watson entitled to the said land at South Brisbane?
3. Are they entitled to the interest of the Testator in the real estate of the said partnership?
4. Are they entitled to the other land of the Testator (if any)?
5. Are they entitled to the personal estate of the said Testator or any part thereof and in particular to the contents of the said house at South Brisbane?
6. Are the persons entitled to the real and personal estate of the said Testator given by him to his said wife or any and what part thereof to be ascertained as if he had died intestate?
7. Ought an issue to be directed (before this action is further proceeded with) to ascertain which of them the said Testator and his wife predeceased the other?
8. By whom and how are the costs of the several parties to this special case to be paid or provided for?

THE case came on for argument, before the Court at its October Sittings; and was then adjourned, to enable enquiries to be made as to alleged fresh evidence of the fate of Mr. and Mrs. Watson.

Sir S. W. Griffith, Q.C., A.G., Lilley with him, for the plaintiff; *Byrnes, S.G.*, for the defendants,

the executors and trustees; *Pain*, for Mrs. Norman; and *Feez*, for the next-of-kin.

Griffith, A.G.: With respect to the land, under *The Titles to Land Act*, sect. 26, Mrs. Watson, being the younger, was presumed to be the survivor. As to personalty, there was no presumption at law. There was no evidence; and there must be positive evidence. *Underwood v. Wing*, 4 D.G., M. & G., 633; *Wing v. Angrave*, 8 H.L., 183, and at 219. The land in the partnership estate was part of the partnership assets.

Pain: The second part of the will should be allowed to stand. Mrs. Norman was in any case entitled to £5,000, as it was simply given to her. The land in the partnership, was dealt with as partnership assets. *Phillips v. Phillips*, 1 Myl. & K., 649.

Feez: The contents of the South Brisbane house went with the personalty. Referred to *Williams on Executors*, 8th edition, 1,210; *Taylor v. Diplock*, 2 Phill. Eccl. Rep., 261; and *The Titles to Land Act*, preamble.

Byrnes asked for an expression of opinion as to the £5,000 to Mrs. Norman.

C.A.V.

On 15th October, *Griffith, Q.C., A.G.*, informed the Court that evidence of survivorship was alleged to have been discovered, and asked them to stay delivery of judgment until the next sittings. Judgment was stayed accordingly, and leave was given to plaintiff to file a suggestion of the discovery of evidence.

On the 4th November, *Griffith*, read a suggestion for postponement of judgment, and trial of an issue upon evidence, procurable to shew that when the "Quetta" struck, testator with others tried to get the starboard boat clear, and was bending down between the mizzen rigging and the rails of the vessel, when he fell into the water and was not afterwards seen by any survivor from the wreck; that Mrs. Watson at that time was standing on the deck with her head between the ratlines, looking into the water after her husband and crying; and that she then turned half round, faced the other people on board, waved her hand to them and said

"good bye"; and that fully sixty seconds or more elapsed between the time of the falling of testator into the water, and the final disappearance of the "Quetta."

LILLEY, C.J.: The question is whether we ought to send this matter for trial by a jury, when there is really no evidence for them to try. We cannot see that directing an issue would lead to any other result than what presents itself to our minds—that there is no evidence of survivorship between the two persons, Mr. and Mrs. Watson.

The rule of law is clear in this colony. As to personalty, there must be some positive evidence of survivorship. There is no artificial rule or presumption. With respect to the personalty here, there being no evidence, the English rule must be followed. With regard to the realty, the colonial law has established a presumption. She, being the younger, must be supposed to have survived. So here there will be two rules to be applied—one applicable to the personalty, the other to the realty. And our answers to the questions submitted in the present case are given on the foundation of these two rules.

To the first question we are asked, "Does any presumption of law arise as to the order in which the deaths of the said testator and his said wife took place—(a) as to the testator's real estate," our answer is—Yes; under *The Titles to Land Act*, section 21, she, being the younger, is presumed to have survived; (b) "as to the testator's personal estate,"—No; there is no presumption of survivorship in respect of personal estate; (c) "as to the land forming part of the assets of the said partnership,"—No; this being part of the partnership assets, partakes of the nature of personal estate, and goes accordingly. To question 2 our answer is—Yes; because of the presumption under the Statute that she survived. To No. 3,—No; because of the absence of presumption or proof that she survived, so as to take it under the will. To No. 4,—Yes, if any, subject to the payment of the £5,000, in the first place, out of the estate, except the specific devise of South Brisbane land. To No. 5,—No. To No. 6,—The

persons entitled to the personal estate are to be so ascertained. To No. 7,—No; it would be useless, there being no evidence. To No. 8,—Costs of all parties out of the estate, to be taxed as between solicitor and client; we think it reasonable it should be so.

Solicitors for plaintiff: *Chambers, Bruce & McNab*, agents for *Barnett*, Cooktown.

Solicitors for defendants Muir and Young: *Bernays & Osborne*.

Solicitor for defendant Mrs. Norman: *Hellicar*.

Solicitors for next-of-kin: *Lilley & O'Sullivan*.

In the matter of GEORGE EDWARD COOPER,
A SOLICITOR.

Solicitor—Misconduct of—Suspension and Fine.

The solicitor received a sum of money on behalf of a client. Instead of paying it over to the client, he retained it, putting the client off with various excuses. His reason to the Court for non-payment was seizure of his office and papers by a creditor, and consequent inability to make up an account, between himself and his client.

The Court ordered the payment of the money, and costs of the proceedings, to his late client by the solicitor; also of a fine of £50; that he be suspended from practice, with leave to apply to remove the suspension at the expiration of twelve calendar months, on proof of payment of the above sums, which was a condition precedent, and also on proof of abstention from practice in the meantime, and of good conduct during suspension.

MOTION for rule absolute to strike a solicitor off the roll.

At the August Sittings of the Court, *Lilley*, on behalf of the Queensland Law Association, obtained a rule *nisi*, calling upon G. E. Cooper to answer the matters contained in an affidavit of W. H. Osborne, Secretary to the Association, or to show cause why he should not be struck off the rolls.

The rule was made returnable at the October Sittings of the Court, and was enlarged, on application on behalf of Cooper, to the present Sittings.

The following are the circumstances set forth in the affidavits read:—A man named Reeve in-

structed Cooper, at Croydon, in August or September, 1888, to recover for him in Sydney some money, part of the estreated bail of a man who had been arrested on a charge of defrauding Reeve of £800. In October, 1888, Reeve learnt from Cooper that the New South Wales Government had allotted him £75 of the estreated bail. Cooper further told him that his agents in Sydney might be able to secure a greater sum, if the matter were not pressed. Reeve asked Cooper at different times about the money, and was told that nothing had yet been received on his behalf. He finally communicated with the New South Wales Department of Justice, and was informed in reply that £75 had been paid to Messrs. Walter Bradley & Sons, Solicitors, Sydney, who were acting as Cooper's agents. He then, on further enquiry, learnt that Bradley & Sons, after deducting charges, had forwarded £70 to Cooper at Croydon. Reeve made repeated applications to Cooper for the money, but was always put off with some excuse. He had not received any part of the £70.

For Mr. Cooper it was stated, in affidavits by himself and a clerk, that the cause of delay in payment was the seizure of respondent's Croydon office, and his inability to get access to his papers, so as to make up the account between Cooper and Reeve. Cooper admitted the delay, but alleged that Reeve owed him some money. He denied having ever evaded payment of the money. He offered to pay the money and costs of the proceedings, and submitted himself to the judgment of the Court.

Lilley appeared on behalf of the Law Association; and *Byrnes, S.G.*, on behalf of Cooper.

Byrnes: No doubt there had been an unwarrantable delay by the solicitor in coming to a settlement with his client. It was not a case, however, calling for extreme punishment. Payment of the money with costs, and, if the Court thought it necessary, a short suspension from practice, would meet the requirements of the case.

Lilley: It was a case calling for extreme action by the Court; Mr. Cooper should be struck off

the rolls. From the very outset the case was surrounded by grave suspicion. This was the third time Mr. Cooper had been brought before the Court; the first was in 1888 (v. 3 Q.L.J., 92), and the second in December, 1889. This case was like *Dyball's case*, 3 Q.L.J., 9, taking a client's money and telling falsehoods about it, and should be dealt with in the same way.

LILLEY, C.J.: If this case were allowed to pass, the Court would leave the public in a position of insecurity, and would expose them to robbery. We might as well license people from St. Helena to practise, as allow licensed officers of the Court to go on in this way. Our order in this case is that the solicitor pay £69 15s. and the costs of this proceeding to Reeve, and a fine of £50; that he be suspended from practice, with leave to apply to remove the suspension at the expiration of twelve calendar months, on proof of payment of the above sums, which is a condition precedent, and also on proof of abstention from practice in the meantime, and of good conduct during suspension.

Solicitor for Queensland Law Association: *Osborne*.

Solicitors for respondent: *Daly & Schacht*.

CIVIL COURT.

REAL, J.

5th November, 1890.

CARE v. JEFFS.

Practice—Counterclaim—Default of pleadings—Motion for judgment on admissions—O. XXIX, rr. 11, 12—O. XXXIX, r. 11.

Where a defendant delivered a statement of defence and counter-claim, and no joinder of issue or answer has been served by the plaintiff, the defendant is entitled to judgment on the statement of claim, and for the relief prayed in the counter-claim, under Orders XXIX, r. 12, and XXXIX, r. 11.

MOTION for judgment on admissions by default of pleadings.

The plaintiff had delivered a statement of claim on a promissory-note, to which the defendant put in a defence, and counter-claimed for the delivery

up of the promissory-note to be cancelled. The plaintiff failed to join issue or answer.

Lilley, for the defendant, moved that judgment be entered for the defendant on the original action, and for the relief prayed in the counter-claim. As regarded the claim, the pleadings must be deemed to be closed, and the statements of fact in the statement of defence deemed to be admitted, under Order XXIX, r. 12, and the defendant was entitled to judgment by Order XXXIX, r. 11. As to the counter-claim, the defendant was entitled to the relief prayed, under Orders XXIX, r. 12, and XXXIX, r. 11.

REAL, J.: There will be judgment for the defendant on the claim, and on the counter-claim for the relief prayed, with costs of both.

Solicitor for the defendant: *Winter*.

DECEMBER SITTINGS OF THE FULL COURT.

GROSHANIG v. VAUGHAN AND OTHERS.

Quashing order—Masters and Servants Act of 1861, 25 Vict., No. 11, sec. 3—Right to leave employment.

A station overseer, when engaging a shearers G., who was a member of the Queensland Shearers' Union, said there were between 30,000 and 40,000 sheep to be shorn on the station. A verbal agreement was then made as to the price per score shorn. The overseer told G. that he was working under the rules of the Queensland Shearers' Union, and that he was paying Union wages. G. said he would shear. The overseer further said, "I expect you to shear through the whole shearing." There was no evidence of any assent by G.

Under r. 10 of the Shearers' Union Rules, any member forced to stop work through sickness, "or any other reasonable cause," shall be paid for the full number of sheep shorn up to the time of his leaving work.

M., the station manager, then had a dispute with a labour union delegate about other labour on the station. M. refused to recognise any union rules outside the shearing shed, and so informed the delegate, and afterwards wrote a letter to him that he had decided not to come under the Queensland Labourers' Union, and would continue shearing with any men who would go on with the work.

A number of the shearers, including G., left their work. M. charged G. with unlawfully absenting himself from his hired service. G. was convicted and fined £10 and costs, or in default one month's imprisonment.

Held, that there was not evidence of a definite agreement to shear through the whole shearing of 30,000 or 40,000 sheep. As this was a penal proceeding, it could not be assumed that there was a definite agreement. The agreement between the parties, as far as the evidence went, was to work by the score, at so much per score.

M.'s letter might be taken by G. as leave or license to leave his work.

Conviction quashed with costs.

MOTION for a rule absolute for an order quashing a conviction against the applicant, under section 3 of *The Masters and Servants Act of 1861*, for unlawfully absentsing himself from his hired service.

George Groshanig, the applicant, was engaged at Amby Downs Station, by the overseer, Samuel Goodwin, to shear there. Goodwin told him there were between 30,000 and 40,000 sheep to shear. He told him they "were shearing under Queensland Shearers' Union Rules in the shed; that union rates would be paid to men working in the shed, but that outside the shed" they "did not recognise the labour union. Groshanig hesitated." Goodwin said "if you don't wish to go to work, you need not do so," and that they "shore under the same agreement in April last." Groshanig said he would go on shearing. Goodwin also told him he expected him "to shear through the whole of the shearing," or words to that effect—"of course I will expect you to shear till the sheep are all shorn."

On a subsequent date, 7th October, Taylor, a travelling delegate for the Shearers' and Labourers' Unions, visited the station, and asked McPherson to recognise the Labourers' Union amongst the station hands outside the shed. This McPherson refused to do; and finally sent a letter to Taylor, as given below, which Taylor read out to the shearers, at a meeting.

Amby Downs,

7th October, 1890.

Mr. G. Taylor,
Amby.

Sir,—I have decided not to come under the Queensland Laborers' Union, and will continue shearing with any men who will go on with the work.

Yours truly,

ANGUS MCPHERSON.

After this, Groshanig and others left. McPherson then charged Groshanig under the 3rd section of *The Masters and Servants Act*, with unlawfully absentsing himself from his hired service. The magistrate convicted Groshanig of the charge, and fined him £10 with costs, or in default one month's imprisonment.

Lilley, for the appellant, obtained at Chambers, on 31st October, a rule *nisi* for a quashing order against the magistrate and the prosecutor, McPherson, on the ground that there was no evidence to support the conviction.

Power, *Lilley* with him, now appeared for the appellant; and *Sir S. W. Griffith, Q.C., A.G.*, and *Byrnes, S.G.*, for the prosecutor.

Power, after stating the facts, contended that there was no agreement under *The Masters and Servants Act*; that was a fatal objection. Groshanig was not a servant under the Statute, and was therefore, free to leave his employment whenever he chose. The 3rd section ran as follows:

If any servant shall agree with any person to serve him for any time or in any manner, and shall not enter into his service or commence his work according to his agreement (such agreement, if in writing, being signed by the parties thereto, or if by parol being made in the presence of a witness), or if any servant having entered into such service, or commenced such work, shall absent himself therefrom without reasonable cause before the term of his agreement shall have expired or before the work agreed for shall be completed (whether such agreement shall be in writing or not in writing), or shall refuse or neglect to fulfil the same, such offender upon being lawfully convicted thereof shall forfeit and pay any sum of money not exceeding £20.

From the evidence, it was clear that Groshanig entered into no definite agreement as to time; and that whatever the agreement was, it was a parol one, and there was no witness as required by the Statute. There was no evidence of assent by the shearers, when the overseer said he "expected" him to shear through the shearing. The only contract was that he would shear for so much a score. Then Groshanig had "reasonable cause" for leaving his employment, under the Shearers' Union rules, under which both overseer and shearers were working. He could leave on

account of sickness in his family, or other reasonable cause, before the end of the work. When Taylor, the union delegate, asked McPherson to recognise unionist rules all over the station, the latter told him he could not recognise the unions. He then wrote a letter to Taylor, which showed that he intended practically to break the shearing agreement. He refused to recognise the union.

REAL, J.: He does not appear to have recognised the Shearers' Union; he only said he would work under their rules. The rules may be recognised, and the union not.

Power: The only construction which could be put on the letter was that the men might go, unless they would work with non-union men. The men went out, and there was no evidence that Groshanig had committed an offence under *The Trades Union Act*, when called out by a delegate. The rule should be made absolute for a quashing order, with costs.

Sir S. W. Griffith: The point as to the agreement being without a witness was not tenable. Groshanig had been engaged under definite conditions. He was told there were from 30,000 to 40,000 sheep to be shorn. Groshanig was engaged to shear them at per score. Goodwin, the overseer, said, "I expect you to shear through the whole shearing," and so on. That the man did not say he agreed to that made no difference, when he went and commenced the work. What is the proper inference to be drawn from the overseer's words? Would a jury be justified in finding on the evidence that the appellant had agreed to continue shearing throughout the season? Instead of there being a written agreement, as contemplated under the shearers' rules, there was a verbal one, and that was in language which indicated the ordinary conditions of shearing. It was a question of fact, whether McPherson, by his letter, led the shearers to believe he was going to break the agreement himself, and not of construction of the law. The magistrate was justified in coming to the conclusion that there was an agreement, and that the defendant below was guilty of a breach of it.

Byrnes: The question before the Court was whether there was any evidence to justify the magistrate in coming to the conclusion that there was an agreement. The Court would not interfere with the determination of the magistrate if there was any evidence offering reasonable grounds for the conclusion arrived at by him. The overseer said he expected him to shear through the whole shearing. There was nothing to show that the agreement was misunderstood by either party, or that defendant thought himself free to leave his work whenever he liked. Defendant did not plead that he did not understand that the agreement was for the whole shearing.

LILLEY, C.J.: Before the magistrate could decide in this case against the defendant, there must be evidence of an agreement. The only evidence relied upon is that, when he was engaged, the terms were explained—that they were shearing under the Queensland Shearers' Union Rules, and that the overseer, Mr. Goodwin, said to him—"We have between 30,000 and 40,000 sheep. I expect you to shear through the whole of the shearing." Then there was an agreement to shear at so much per score. The evidence is that there was no reply by the man. There appears to have been no verbal consent by him, and I take it that he regarded that speech as a hope and expectation by the master, but not as a definite agreement which was to bind them mutually until the 30,000 or 40,000 sheep were shorn. We can only infer contracts from the terms used. Expectation is not a term to bind either party. The defendant's silence can not be regarded as a positive assent to undertake the shearing of 30,000 to 40,000 sheep. This proceeding is highly penal and the defendant is liable to imprisonment, if he break a contract; and I certainly cannot regard his silence as positive assent. Upon that point I must assume that there was really no definite agreement between the parties.

But they were shearing under the Shearers' Union rules, and I think there is another ground on which we might decide the case against the decision of the magistrate. By the 10th rule, under the head of "retiring from work," it

was provided that "any member of this Union forced to stop work on account of sickness of self or family, or for any other reasonable cause, shall be paid for the full number of sheep he may have shorn up to the time of his leaving work." Well, that would be recognised. It had been agreed by complainant that all the rules should be in effect between them in the shed, and he must be taken to have known that that rule was in existence. There is an express provision there, to my mind, that a man from reasonable cause may retire from work. This man was on piece-work, working by the score. McPherson knew that Taylor was delegate of the labour union, and was working for the men. He and Taylor had a discussion about these rules being extended to the whole run. After that he wrote a letter to Taylor, who, there is evidence to show, read it to the men. That letter contains at the end of it something very like a license to the men to leave their employment. It can hardly be said that the man had not reasonable cause to desist from work; because he might reasonably come to the conclusion, after hearing the letter, that McPherson did not care whether he stayed or went, and could do very well with the men who chose to remain. Therefore there was something very like a license, and the defendant could leave the work if he was dissatisfied. Therefore on both grounds I think the rule must be made absolute. I rely most on the first ground, on which I base my judgment. The rule should be absolute, with costs

REAL, J.: I agree with The Chief Justice on the first ground. On the second, I think it was open to the magistrate to find that the letter amounted to leave and license. However, he did not so decide. [His Honour then read the letter.] This letter, taken by itself, would amount to leave and license, but, taken with what had passed between McPherson and Taylor, it was ambiguous, and might be decided either way by the magistrate. But, on the other ground, defendant is entitled to succeed unless an agreement to remain to the end of the season, has been proved. The words proved, are "We are shearing under the

Queensland Shearers' Union Rules in the shed . . . under the same agreement as in April last." No evidence was given to show that, by the terms of the April agreement, the shearers agreed to stay till the end of the shearing. The price for shearing was at per score; and by the rules, a shearer must give up his ticket before commencing work, and he is not entitled to have the same returned to him until the end of the shearing; and if he leave before, he must pay at the rate of £1 per week to the mess. These are all the penalties under the Queensland Shearers' Union Rules. I think under these rules he had a perfect right to leave whenever he had completed his score. The penalty for leaving before completing his score, is the detention of his ticket, and loss of the price of the part of the score he had shorn. He was not bound to shear any number of sheep beyond twenty. There was no agreement proved that defendant should remain over the shearing of any number of sheep beyond a score. I think therefore, the rule should be made absolute, with costs.

Solicitors for prosecutor: *Chambers, Bruce & McNab*, agents for *Thompson*, Roma.

Solicitors for defendant: *Thynne & Goertz*.

IN CHAMBERS.

HARDING, J. 7th and 14th January, 1891.

DAVIS v. HIGGINS.

QUEENSLAND RAILWAY COMMISSIONERS,

GARNISHEES.

STUBER, CLAIMANT.

Practice—Garnishee order absolute—Rehearing—Order XLIV, rr. 6, 7—Judicature Act (40 Vic., No. 6), s. 4, s.s. 8.

A rule nisi setting aside a garnishee order absolute, was made absolute on the motion of a claimant, who had no knowledge of the proceedings, and who would have been prejudiced by the original order. An issue directed in which the claimant is plaintiff, and the execution creditor, defendant.

Semble, better form of rule nisi would be for rehearing and setting aside.

RULE *nisi* to set aside a garnishee order absolute.

The order had been made absolute against the Queensland Railway Commissioners as garnishees. Subsequently, a claimant, Struber, intervened, and an order *nisi* to set aside the order absolute was granted with stay of proceedings in the meantime, on the applicant giving security for costs of the application. From the affidavits filed, it appeared that the judgment debtor, Higgins, had been the proprietor of certain lands, over which he had given one, Murray, an equitable mortgage. Struber paid off the money and took up the security, and advanced further sums. Notice of resumption was received from the Railway Commissioners, and negotiations were carried on in Higgins' name. Struber gave Higgins the deed to carry out the sale, and Higgins gave Struber the order to receive the money. Struber did not know of the proceedings till the garnishee order had been made absolute.

Feaz, for Struber, a claimant, moved absolute the order *nisi* to set aside the garnishee order absolute.

Wilson, for the plaintiff, shewed cause, and took the preliminary objection that, Struber was too late to apply in this form; he must come before the order is made absolute. There is a special procedure under O. XLIV, rr. 6, 7. If there had been a suspicion that the moneys were in the nature of a trust, the order would not have been made absolute. *Roberts v. Death*, 8 Q.B.D. 319. There was no occasion to serve the judgment debtor. The order *nisi* should have been for an injunction.

Feaz: Struber could not have applied before. If the matter is not reheard, an injustice will be done. There is no ground for an appeal on the facts as they stood at the time the order was made absolute. A garnishee order can be set aside. *Seymour v. Corporation of Brecon*, 29 L.J., Ex. 248; *Badeley v. Consolidated*, 38 Ch.D., 238; *Randall v. Lithgow*, 12 Q.B.D., 525; *Dwyer v. Burn*, cor. C.J., April 30th, 1890.

HARDING, J.: I cannot entertain an appeal

from my own decision. This seems to be in the nature of a rehearing. *Jopp v. Wood*, 33 Beavan, 372; *Re Adam Eyton, Ltd.*, 35 Ch.D., 299; *Judicature Act*, sec. 4, (8). It appears to me that Struber may be materially interested in the order absolute, that he had no knowledge of the application therefor, and was not guilty of laches in not appearing thereon. Acting on the authority of *Jopp v. Wood*, he should be enabled to take part in a rehearing; how he may be so enabled, is mere matter of form; by proceeding on the rule *nisi*, should he succeed, that result will be obtained, and consequently, the preliminary objection should be overruled. The better form of the rule *nisi*, would seem to be to shew cause why the matter should not be reheard, and the order absolute set aside, and for further relief.

Order: Order absolute to be set aside. The garnishees to pay the money, less their costs, into Court, to abide the event of an inquiry, whether the money is the money of Struber or Higgins, at the date of the order *nisi*, the claimant being plaintiff, and the execution creditor, defendant; (in Form H, 39). Issue to be prepared within two days after vacation, return within two days. Trial at the next Rockhampton Sittings.

Solicitors for plaintiff: *Daly & Schacht*.

Solicitors for claimant: *Bernays & Osborne*.

Solicitor for garnishees: *J. Howard Gill*.

HARDING, J.

14th January, 1891.

In the matter of THE TRUSTEE ACT OF 1889, AND
in the matter of THE WILL OF GEORGE
HOOPER, DECEASED.

Trustee Act of 1889, (53 Vic, No. 4), sec. 10—
Passing accounts—No commission—Reg. Gen., May 6th, 1890, rr. 3, 8.

There is no authority to compel the Court to pass trustee's accounts, where no commission is asked.

Re the will of Ridler, 3 Q.L.J., 176, distinguished.

SUMMONS to pass trustee's accounts.

Jodrell, for W. J. Hooper and Robert Thorrold, the trustees of the will of George Hooper, deceased, applied to pass their accounts. The

trustees did not ask for commission, an allowance being made them in the will. The authority for the application is rule 8 of *Regulæ Generales*, of May 6th, 1890, prepared in pursuance of sec. 10 of *The Trustees Act, 1889*. The trustees wished to pass their accounts for their own protection.

HARDING, J.: The question of passing trustee's accounts, was referred to the Full Court by me in *Re the will of Bidler*, 3 Q.L.J., 176. In this matter, the trustees apply to pass their accounts, but do not ask commission. Not applying for the allowance of commission, it is not necessary for them to file their accounts under rule 3 of "The Rules of Court under *The Trustees Act of 1889*," and the application is dismissed.

Solicitors for the trustees: *Thynne & Goertz*.

HARDING, J. 14th January, 1891.

QUEENSLAND NATIONAL BANK, LIMITED, v. MANT
AND WIFE.

Practice—O. XIV, r. 1a—Judgment against married woman—Separate estate—Form of judgment approved.

In an action against husband and wife, the wife did not enter an appearance, and judgment was signed by default against her. The judgment was subsequently vacated, and an order for judgment against her separate estate approved of.

Fees, for the plaintiff, applied on summons for (1) an order for leave to sign judgment in this action, for the amount indorsed on the writ, with interest, and costs to be taxed; but that the execution thereon, be limited to the separate estate of the defendant, Anna M. Mant, not subject to any restraint against anticipation; (2) a declaration that any separate estate of the said defendant, Anna M. Mant, not subject to any restraint against anticipation, to which the said defendant was entitled at the time or respective times, when the moneys mentioned in the indorsement of the writ herein, were paid or advanced to the said defendant, or accrued due from her to the plaintiffs, is chargeable with the payment to the plaintiffs, of the amount indorsed on the writ, with

interest and costs, including the costs of and occasioned by this application; (3) an order that an inquiry may be had, whether the said defendant had at the respective times aforesaid, and has now any, and what separate estate, and of what it consists, and from what it has arisen, and in whom the same is vested, and whether the same is in any and what manner, and to any and what extent, subject to any restraint against anticipation, or is charged or liable to the payment of any, and what debts and charges. *Turnbull v. Forman*, 15 Q.B.D., 234, was cited.

HARDING, J., referred to *Scott v. Morley*, 20 Q.B.D., 120; and *Chitty's Forms*, 519; and granted an order in the above form, the inquiry to be before the Registrar, and allowed costs of the application.

Solicitors for the plaintiff: *Hart & Flower*.

HARDING, J. January 14th, 1891.

STANLEY v. NEILL.

Practice—Costs—Specially indorsed writ—Mittimus—District Court—O. LIV, r. 1a.

Where a writ has been specially indorsed in the Supreme Court, and the action is remitted to the District Court, the successful party is entitled to costs on the Supreme Court scale up to the order for *mittimus*, on the District Court scale for the trial, and on the Supreme Court scale for subsequent proceedings, notwithstanding the fact that the amount recovered is under £30,

APPLICATION for costs.

O. B. Lilley, for plaintiff, applied for costs of an action commenced in the Supreme Court, and remitted to the District Court for trial.

Fees, for the defendant: The plaintiff recovered less than £30, and is not entitled to costs, unless allowed by a judge. O. LIV, r. 1a. The District Court has a peculiar rule as to costs.

Lilley: The writ was specially indorsed, and the action could not have been brought in any other way.

HARDING, J.: The writ being specially endorsed, I consider the amount makes no difference. Let

the plaintiff have his costs on the Supreme Court scale till the order remitting the action to the District Court, the costs of the trial on the District Court scale, and subsequent costs on the Supreme Court scale.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitor for defendant: *Bunton*.

HARDING, J. January 28th, 1891.

KELLAWAY v. EMERSON.

Practice—Setting aside judgment by default—Non-indorsement of writ—O. IX, r. 9—O. XXIX, r. 14—O. LVI, r. 6.

The service of the original writ, as well as a copy, and the consequent non-indorsement on the writ of the day and month of service, are not sufficient grounds for setting aside a judgment by default.

SUMMONS to set aside a judgment by default.

Feez, for the defendant, applied to set aside a judgment and subsequent proceedings on the ground that, in serving the writ, the original as well as a copy had been left, and the day and month of service had not been indorsed on the writ. No appearance had been entered. O. IX, r. 9, O. XXIX, r. 14, O. LVI, r. 6, were cited.

Rutledge, for the plaintiff, *contra*. On a previous application by the plaintiff's solicitor, leave had been given to proceed by default, despite the non-indorsement of the date of service under O. IX, r. 9.

HARDING, J., overruled the technical objection, but on the merits allowed the judgment to be set aside, on the defendant paying the costs occasioned by his non-appearance.

Solicitors for plaintiff: *Chambers, Bruce & McNab*.

Solicitor for defendant: *Hellicar*.

HARDING, J.

29th January, 1891.

CROOM v. COHEN.

Capias ad respondendum—Special bail—Payment into Court—Bond cancelled—Common Law Process Act, 1867, (31 Vic., No. 4), s. 48.

An order had been obtained for the issue of a writ of *ca. re.* against the defendant, for the amount endorsed on the writ, and the defendant was held to bail.

On an application by the defendant and a surety, to extend the time for putting in special bail under the bond, or for an order to pay the money into Court with £20 for costs, to abide the event, and for cancellation of the bond, the following order was made:—*Order*: By consent if the money mentioned in the bail bond be paid into Court to-day, with £20 to answer costs, let the bail bond be cancelled, and let the defendant pay the costs of this application.

On the 22nd January, the plaintiff's solicitors obtained an order for a *ca. re.* against the defendant, for the amount indorsed on the writ, £904 6s. 6d.

Petrie, for the defendant, and a surety, Samuel Cohen, applied to extend the time for putting in special bail under a bond, dated 23rd January, till 5th February, or for payment into Court with £20 to abide the event for costs, and if the money be paid into Court, that the bail bond be cancelled.

C. B. Lilley, for plaintiff, opposed the application as to an extension of time, on the ground that the surety would be discharged.

Petrie then abandoned the application as to an extension, and offered to pay the money into Court that day, and the costs of the application.

Lilley consented thereto.

HARDING, J.: If the money mentioned in the bail bond be paid into Court to-day, with £20 to answer costs, let the bail bond be cancelled, and let the defendant pay the costs of this application, fixed at four guineas; the whole order being by consent.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitors for defendant: *Petrie & O'Shea*.

COR.: LILLEY, C.J. 11th and 15th Dec., 1890.
AND FEBRUARY SITTINGS OF THE FULL COURT.

JANE GRIMISH (BY HER NEXT FRIEND) v. SCOTT,
DAWSON AND STEWART AND SAMUEL GRIMISH.

*Married woman—Freehold estate during marriage
—Husband's life estate—Real Property Act.*

The Real Property Act does not affect a married woman's estate in fee acquired before marriage. Her husband has a freehold estate in her property during their joint lives, and can obtain a certificate of title as owner of such freehold, and be entered on the register.

The wife here charged her estate with the amount of her husband's debts to the defendants, by an unacknowledged agreement. None of the parties contemplated charging the husband's estate; in fact, did not declare the certificates of title as security in the husband's subsequent insolvency. Defendants ordered to return agreement for cancellation, and to deliver up her certificates of title to her.

ACTION for declaration that a certain unacknowledged agreement, by which plaintiff agreed to charge her estate for payment of her husband's trade account with the other defendants, was void as against her, and for delivery of it up to her for cancellation; and for delivery to her of her certificates of title by the defendants Scott, Dawson & Stewart.

Lilley and *Jodrell* appeared on behalf of the plaintiff; and *Sir S. W. Griffith, Q.C., A.G.*, *Fees* with him, for the defendants.

Lilley stated the case:—On 23rd August, 1889, three days before their marriage, defendant Grimish conveyed the land in question to plaintiff. They were registered in her maiden name of Jane Phillips, and the certificate of title issued in her maiden name. In September, 1889, defendants Scott, Dawson & Stewart, to whom Grimish was indebted in over £700, had possession of these certificates of title. They wrote several times asking for plaintiff's signature to a letter charging the land with the debt. Finally, she signed a letter or agreement to that effect on 6th September, 1889; it was not acknowledged as required by statute in case of married women. Grimish afterwards went insolvent, and Scott, Dawson & Stewart proved for their full debt, and declared they held no security.

Lilley submitted that she was a married woman, and incapable to contract, except as to her separate estate. If she intended to affect her real property, it must be by deed duly acknowledged.

Griffith, Q.C., A.G.: There was nothing in *The Real Property Act* inconsistent with the existence of the husband's life estate during coverture, nor with an estate by the courtesy. Referred to proviso to sect. 80, *Real Property Act*. The power of the wife to deal with her estate was not altered. The deeds were a valid security so far as the husband's interest was concerned. He had an estate or interest during their joint lives. *Robertson v. Norris*, 11 Q.B., 916. The defendants' case rested on the life estate of the husband, and they were entitled to retain the deeds.

Lilley: It was not possible to contend that her estate was bound. There was no evidence that he or the other defendants intended to bind his own estate, and they have declared they did not hold any security as against him. There was no equitable mortgage of his estate.

C. A. V.

On 15th December, His Honour delivered judgment as follows:—

LILLEY, C.J.: Mrs. Grimish sues, and joins her husband as a party, for a declaration that a certain agreement of 6th September, 1889, by which she consented to make her estate in two allotments chargeable for payment of her husband's account with the defendants, is void as against her, and that it may be delivered up to be cancelled; secondly, she asks that the defendants be ordered to deliver over the certificates of title to her. There is really no dispute about any material facts in this case; but perhaps it would be better if I stated them briefly, as it will make my judgment more clearly understood. It appears that Mrs. Grimish was a Miss Jane Phillips, and I infer that her present husband, being registered proprietor of these allotments, in contemplation of marriage conveyed them to her under *The Real Property Act*, and she, as Jane Phillips, unmarried, was the registered proprietor. Three days after she became

registered proprietor, he married her. Then in some way—possibly with her consent, though that is immaterial—he got possession of her certificates, and lodged them with the Royal Bank as security for a debt of his. Afterwards, on his authority, the bank transferred the certificates to the defendants Scott, Dawson & Stewart. The defendants undoubtedly gave consideration for the certificates, whether entitled to them or not. They had paid the Royal Bank, and appear to have made large advances—£600 or £700—to this man Grimish, and their relations went on as debtor and creditor until, in September, 1889, they got a letter from Mrs. Grimish, which is the agreement she now asks to be delivered up and declared void.

Before the marriage, when he put the property in her name on the register, there was nothing to declare it was to be held as separate estate. She took the fee simple as registered proprietor, with no express declaration that it was separate estate. When he married her, she being registered proprietor, a married woman having an estate in fee in this property, in my opinion he became entitled to a freehold estate for their joint lives in the property. That is my judgment. In other words, it is my opinion, looking at *The Real Property Act*, that it has not touched the old common law estate in this respect. The husband and wife on their marriage stand relatively in this position to one another. She was registered owner of property—of a registered estate—in fee simple. During their joint lives he had a freehold estate in her property. After his decease, she would have her old estate in fee, which she never lost. That was their position. During their joint lives, it was competent for him to have got a certificate of title as owner of a freehold estate. Being in that position—she holding an estate in fee, and he having a freehold estate which he could dispose of—he got hold of these certificates. The letter of 6th September was unacknowledged. It was written without the precaution which the law throws around her, and as against her and her estate of fee simple, the defendants took nothing. That was in her, and remains in her, and the

defendants take nothing of that—nothing whatever.

Then have the defendants, by any act of Grimish or his wife, got a lien, in the nature of an equitable mortgage in the husband's interest, in his freehold estate? In my opinion they have not. When we come to consider whether this certificate was deposited by the husband in his estate, I think there is very cogent evidence that it was not. It appears from a very important act on the part of the defendants themselves. Grimish became insolvent; and, if they had had any claim on any part of his estate by way of security, it was for them to value that security. Instead of that, they proved in full, and made no deductions on account of security, in fact did not make any claim of security on his estate. I think this strong evidence that, when plaintiff's husband deposited that security, the intention of all parties was that they were charging the wife's interest. But that, of course, being an unacknowledged act under the statute, not having the protection which the statute requires shall be thrown around an act of a married woman like this, was ineffectual to bind her estate. It was ineffectual to bind the husband's, because there was no intention to do so. It is clear that the parties thought they were secured against the wife's estate, and not against the husband's interest; otherwise Scott, Dawson & Stewart would have taken care, under legal advice, to make it clear that it was deposited by Grimish as a charge on his freehold interest. That would have given Scott, Dawson & Stewart the right to call on Grimish to get a certificate of title for his freehold interest, and make him deposit that as security with them. But, as I say, her interest is entirely free, as it was unacknowledged, and as there was not any intention on anyone's part to charge his interest.

With regard to my view of the rule of interests of husband and wife, they have some interests as they would have had before the Act was passed. She has the fee; and, while living with her in married life, he would have a freehold estate, and could have charged that. The matter, as far as

the statute is concerned, and as to the old estates where the statute has not dealt with them, will be found very fully discussed in the carefully considered judgment *In re Wildash & Hutchinson*, Q.L.R., Part II, p. 47, delivered in September, 1877. So this is not a new view of mine. I think it has been accepted; at any rate, no one has questioned it. On p. 50, we find the following:—

“Examples might be multiplied by a diligent search through the patchwork of this ill-drawn statute, to show that there was no intention to destroy legal and equitable interests outside the Act.”

In that case, I decided there might be an equitable mortgage by way of deposit of the certificate of title. It is important to the parties to consider the language I used there:—

“I adopt the language of Kindersley, V.C., in *Pirie v. Bury*, (2 Drew, 42), in describing the effect of a mere deposit:—‘By the deposit, the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee.’ There is nothing in *The Real Property Act* inconsistent with the validity of this class of security. The statute does not create new estates and interests in land, nor does it abolish the old, except the vendor’s lien.”

In this case, so far as it is a matter of contention, I hold that there was no deposit touching the husband’s estate; that it did not affect her estate, and that she should have judgment for the relief prayed. These instruments must be delivered up, as regards her; there may be an endorsement as to the marriage. The agreement must be returned and cancelled as to her estate, and the certificates of title must be delivered up to her. The costs must follow the event.

At the February sittings of the Full Court, the defendants appealed from the above judgment.

Griffith, Q.C., A.G., *Feez* with him, appeared on behalf of the appellants, the defendants below, and *Lilley* and *Jodrell* for the respondents.

The same arguments were used on both sides as in the Court below.

The following cases were cited by—

Griffith, Q.C., A.G.: *Robertson v. Norris*, 11 Q.B., 916; *Leathes v. Leathes*, L.R., 5 Ch.D.,

281; *Ex parte Rogers, Re Pyatt*, L.R., 26 Ch.D., 81; and *Cooper v. Vesey*, L.R., 20 Ch.D., 611.

LILLEY, C.J., delivered the judgment of the Court: Substantially the judgment below must be affirmed—that is, that the defendants must give up to the plaintiff the agreement of 6th September, 1889, to be cancelled, and her certificates of title. The judge below having held that there was an estate in the husband, the certificates must be brought into Court under the order, with liberty to the parties to get the fact of marriage registered on the certificates and on the register, and then afterwards they must be delivered to the wife. This endorsement must be made within a reasonable time. Leave to apply. The defendants to pay costs of appeal. Let plaintiff have her costs of action paid into Court.

Solicitor for plaintiff: *Nazer*.

Solicitors for defendants: *Hart & Flower*.

In the matter of “The Stamp Duties Act of 1866,” and in the matter of A DEED OF ASSIGNMENT MADE BETWEEN WILLIAM BULLCOCK OF THE ONE PART, AND BENJAMIN SPARKS OF THE OTHER PART, AND DATED THE 17TH SEPTEMBER, 1890.

Liquidation—Exemption from stamp duty in insolvency—Insolvency Act, sec. 190—Stamp Duties Act of 1866—Certificated debtor not an insolvent.

A liquidating debtor, after receiving his certificate of discharge, repurchased from the trustee the estate in liquidation, in pursuance of a resolution of the creditors that the debtor, upon receiving his certificate, should repurchase on certain conditions. The debtor having received his certificate, a conveyance embodying the resolution was executed by the trustee, and the estate was transferred.

The question to be decided was whether the conveyance came under the exemption clause of *The Insolvency Act*, sec. 190, or was liable to the ordinary duty required under *The Stamp Duties Act of 1866*.

Held, that the conveyance, which came after the certificate of discharge, transferred the insolvent estate not to a liquidating debtor, but to a discharged insolvent, who was in the same position as an outside purchaser, and must pay the stamp duty.

SPECIAL case stated by the Stamp Commissioners under section 21 of *The Stamp Duties Act of 1866*.

On or about the 23rd day of October 1890 upon the hearing of an action by Benjamin Sparks against Samuel Hart before His Honor Judge Paul at the sittings of the Southern District Court at Brisbane the instrument hereinafter set out was tendered in evidence and His Honor refused to allow it to be received in evidence upon the ground that it had not been stamped.

Subsequently to the last-mentioned date the said instrument was submitted to the Stamp Commissioners for their opinion as to whether or not it was liable to stamp duty and the said Stamp Commissioners determined that it was so liable under the provisions of the said Act and schedule number one thereto as a conveyance or transfer of property actually sold.

The said Stamp Commissioners thereupon assessed stamp duty on the said instrument at £111 15s. together with £22 7s. for fine in all the sum of £134 2s.

The said Benjamin Sparks has paid to the said Stamp Commissioners the said sum of £134 2s. and has in accordance with the provisions of section 21 of the said Act deposited with them the sum of £10.

The said Benjamin Sparks has declared himself dissatisfied with the said determination of the said Commissioners and contends that the said instrument is not liable to stamp duty as a conveyance and has requested the said Commissioners to sign and state a case under the Act for the purpose of enabling him to appeal against the said determination of the said Commissioners.

The instrument hereinbefore referred to.

"This indenture made the seventeenth day of September one thousand eight hundred and ninety between William Bulcock of Brisbane in the Colony of Queensland accountant (the trustee of the property of Benjamin Sparks of Turbot Street Brisbane aforesaid general merchant in liquidation) of the one part and the said Benjamin Sparks of the other part Whereas the said Benjamin Sparks on or about the second day of April last past filed a petition for the liquidation of his affairs by arrangement or composition with his creditors in the Supreme Court of the Colony of Queensland And whereas a meeting of the creditors of the said Benjamin Sparks duly convened was held on the seventeenth day of April last past such meeting being by resolution adjourned until the twenty-first day of April last past And whereas on the twenty-first day of April the adjourned meeting was held and thereat it was resolved that the affairs of the said Benjamin Sparks be liquidated by arrangement and not in insolvency and that the said William Bulcock be and he was thereby appointed trustee of the property of the said liquidating debtor which appointment was subsequently confirmed by certificate under the seal of the said Supreme Court of Queensland And whereas at a meeting of the creditors of the said liquidating debtor duly convened and held on the ninth day of June one thousand eight hundred and ninety it was resolved that the said William Bul-

cock as such trustee as aforesaid be and he was thereby empowered to sell to the said liquidating debtor all the assets real and personal in the estate of the said Benjamin Sparks in liquidation for the sum of seven shillings and sixpence in the pound on all proved and admitted debts of the said estate that the purchase money should be payable by promissory notes of the said liquidating debtor at three six nine and twelve months respectively endorsed by the Financial Guarantee and Agency Company of Queensland Limited each of such promissory notes to be for an amount equal to the sum of one shilling and tenpence half-penny in the pound on the amount of such proved and admitted debts such promissory notes to bear date the day following the issue of the debtor's certificate of discharge by the Supreme Court of Queensland and that after payment of all liabilities incurred by the said William Bulcock as such trustee in the management of the said estate the balance of the moneys received by him together with all promissory notes bills of exchange and other securities should be delivered to and become the property of the said liquidating debtor together with all rights to equities of redemption And it was also resolved that the discharge of the said Benjamin Sparks be and the same was thereby granted And whereas by certificate under the hand of the Registrar of the Supreme Court of Queensland and the seal of the said Court bearing date the twelfth day of June one thousand eight hundred and ninety the said Benjamin Sparks was duly granted his discharge Now this indenture witnesseth that in pursuance of the said resolution and in consideration of the premises and of the receipt by the said William Bulcock of the promissory notes hereinbefore referred to and which are more particularly set out in the schedule to these presents the receipt whereof the said William Bulcock doth hereby acknowledge He the said William Bulcock doth by these presents grant bargain sell assign transfer and set over unto the said Benjamin Sparks his executors administrators and assigns all the lands goods book and other debts securities for money chattels effects and things and all other real and personal property or assets belonging to the estate of the said Benjamin Sparks in liquidation and which are now vested in the said William Bulcock or to which he is entitled as such trustee as aforesaid together with all moneys in the hands of the said William Bulcock as such trustee as aforesaid after paying all liabilities incurred by him as hereinbefore recited and all promissory notes bills of exchange and securities for money And also together with the goodwill of the business of a general merchant lately carried on by the said Benjamin Sparks up to the date of the passing of the resolution for liquidation of his affairs hereinbefore mentioned and from that date to the date hereof carried on under the supervision of the said William Bulcock as such trustee and all rights privileges benefits and advantages belonging or appertaining thereto and all the estate right title and interest of the said William Bulcock in all the premises hereby assigned or intended so to be To hold the same unto and to the use of the

"said Benjamin Sparks his executors administrators and assigns absolutely subject to all encumbrances affecting the same And the said William Bulcock doth hereby covenant with the said Benjamin Sparks his executors administrators and assigns that he the said William Bulcock will at all times hereafter at the request and cost of the said Benjamin Sparks or other the person or persons requiring the same do and execute all such further and other lawful acts deeds assignments assurances and things for the better enabling him the said Benjamin Sparks his executors administrators or assigns to recover receive and possess or for further assuring to the said Benjamin Sparks his executors administrators or assigns all the lands goods book debts securities for money chattels effects and things and all other real and personal property or assets belonging to the estate of the said liquidating debtor or any part or parts thereof respectively In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written."

This case came on for hearing before the Full Court at its December Sitting (cor. LILLEY, C.J., and REAL, J.). Judgment was reserved; and the case was then set down for further argument at the February Sitzings of the Court (cor. LILLEY, C.J., HARDING and REAL, JJ.)

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Byrnes with him, appeared for the Stamp Commissioners; and Lilley for the appellant, B. Sparks.

Lilley submitted that the transfer of the estate was a proceeding in the liquidation, and under sec. 190 of *The Insolvency Act* was therefore exempt from duty. Referred also to secs. 129 and 130 of the same Act.

Counsel for the Crown was not called on.

LILLEY, C.J., delivered judgment as follows: The grammatical reading of sec. 190 of *The Insolvency Act* is sufficient to decide the case. This was a proceeding in insolvency, although in the form of a liquidation. The creditors met, and agreed that, upon Sparks obtaining his certificate, he should repurchase his estate. A resolution was passed to that effect, and the conveyance embodying that resolution was drawn up. The conveyance undoubtedly was made on the basis of the resolution. The estate was transferred, and after that did not remain the estate of the insolvent under the liquidation, but was in fact the

property of Mr. Sparks discharged. That being so, it does not come within the words exempting a conveyance from stamp duty, because it does not remain the estate of the insolvent in the ordinary sense under *The Insolvency Act*. It remains and is in fact the estate of Mr. Sparks. Under the circumstances I think the Commissioners were right in requiring the imposition of the stamp.

HARDING, J., said as follows: I agree with the reasoning of The Chief Justice. I have arrived at the same conclusion by reading sec. 190 of the Act, and giving the usual interpretation to the word insolvent—a person unable to pay his debts as the same become due. Inserting those words where the word insolvent occurs, I find that Mr. Sparks in this case was the purchaser, and was legally entitled to be dealt with as a purchaser. An outside purchaser would have to pay stamp duty, and as Mr. Sparks occupies the position of an outside purchaser, he is liable to pay stamp duty. I think the ruling of the Commissioners must be upheld.

REAL, J.: I am of the same opinion.

Appeal dismissed with statutory costs—£10.

Solicitor for the Commissioners: Gill, Crown Solicitor.

Solicitors for the appellant: Chambers, Bruce & McNab.

APRIL SITTINGS OF THE FULL COURT.

COX, DOWLING AND CO. v. JONES AND ANOTHER.

Taxation of costs—Bills in cross-actions—

Taxation of claim and counterclaim as if separate actions.

In a cross-action for trespass, plaintiffs obtained a verdict for £910, and the defendants for £1,360. Judgment was entered for the balance. The bills of costs in the two actions were ordered to be taxed as if each were a separate and independent action, after which one set of costs should be set off against the other, and the *allocatur* given for the balance. On appeal it was *Held*, that each party should bring in his bill of costs as if nothing else had been tried but his own action. Each bill should be taxed as a separate and independent action and set off. Both parties were therefore entitled to include general costs.

APPEAL from taxation of costs.

This was an action and a counterclaim for cross trespasses by cattle, and was tried before The Chief Justice and a special jury of four, who brought in a verdict for plaintiffs of £910, and for defendants of £1,360. Judgment was entered for the defendants for the balance—£450. It was subsequently ordered that plaintiffs enter judgment for the costs of their action, and then that defendants enter judgment for their costs of the counterclaim. The actions were to be taxed as if each was a separate and independent action, and one set of costs was to be set off against the other, and the *allocatur* given for the balance. Plaintiffs' costs were taxed and allowed at £507 17s. 8d., and defendants' costs were taxed and allowed at £187 11s. 5d. The *allocatur* was for the difference, £370 6s. 8d.

The defendants disagreed with the taxation of the plaintiffs' bill, and objected to the allowance of several items in plaintiffs' bill.

The question upon which the judgment went was whether, after the claim and counterclaim had been ordered to be taxed as separate actions, the expenses of plaintiffs' witnesses should not be divided, on the ground that the witness should be treated as attending two actions.

Lilley appeared for the defendants, in support of the appeal; and *Byrnes, S.G., Shand* with him, for the plaintiffs.

His Honor Mr. Justice Real did not sit, owing to his having been engaged in the case while at the Bar.

Lilley cited *Shrapnel v. Lang*, L.R., 20 Q.B.D., 384, and *Baines v. Bromley*, L.R., 6 Q.B.D., 695. The main question between the parties was, what was the rule as to common items. That had not been decided yet in England or here. He submitted that in the case of a witness who had come a great distance and at great expense to give evidence, equally on claim and counterclaim, the taxing officer should not give the plaintiffs costs of coming here, and allow only two days in town on the counterclaim.

Byrnes, S.G. The Chief Justice based his

judgment below on *Shrapnel v. Lang*. Common items did not mean items common to both defence and counterclaim, but to both parties. That was the decision in *Shrapnel v. Lang*. Fry, L.J., said there, that the defendant was entitled to costs of the counterclaim, but not to the general costs of the action. Cited *Ward v. Morse*, L.R., 23 Ch.D., 577.

HARDING, J., delivered the judgment of the Court:

This is an action in which Cox, Dowling & Co. are the plaintiffs, and Jones and Mather are the defendants by original action, and *vice versa* by counterclaim between them. The action, as I have gathered, was for cross-trespass; so that the counterclaim was in the nature of a cross-action, and not by way of set off; and so each was, as far as the trial was concerned, an independent action of trespass. I may say here, that each party recovered—the defendant the greater amount. As the result of that, The Chief Justice, who tried the case, ordered the judgment for costs as follows: Enter judgment for plaintiffs for costs of the action, and judgment for defendants' costs of counterclaim, as if each were separate and independent actions. Set off one set of costs against the other, and give *allocatur* for balance. That being the order for the costs, it has been contended by the Solicitor-General—and I will not say unsuccessfully or unnecessarily—that, if no order had been made for the costs in this case, the costs would have been taxed, the plaintiffs' costs of action given him, and additional costs; and the defendants' costs of counterclaim and non-general costs of action. He deduces that, as the result from following *Shrapnell v. Lang*, and *Ward v. Morse*. But here The Chief Justice has made a special order as to the costs, and he has not mentioned the general costs. The claim and the counterclaim are to be treated as separate actions, and consequently there are two separate sets of costs. That being so, His Honor must have had in his mind the result that would have followed from the ordinary practice of the Court.

The result would have been to the defendants, a verdict from the jury of nothing. This is not a common order. I think this case stands alone, and the meaning and sense of the order is this, that the plaintiffs in their action bring in their costs, as though nothing else had been tried in that action. The taxing officer taxes that bill, gives them general costs of that action, as if successful plaintiffs in that action alone. Put that aside. Then the defendants bring in their bill of costs on their counterclaim; but according to The Chief Justice's order, they are entitled to bring in a bill of costs as if of an original and separate action. Therefore they are entitled to bring in their bill as of a subsequent and independent action, putting in charges for general costs, and anything else they could sustain, as plaintiffs. The taxing officer taxes the two bills, balances them, and gives his *allocatur* for the balance. I have not gone into the items—it is not necessary for us to go out of our way and pick out 5s., 2s. 6d., and so on, with important business of the country waiting.

If the bills are not taxed according to the principles I have stated, then the taxing officer will review. Our order is, let the bills of costs be reviewed on the principles just laid down. Let each be taxed as a separate and independent action, and set off.

Lilley asks for costs of appeal.

Byrnes, S.G., opposes.

HARDING, J.: Review, with costs.

Solicitors for plaintiffs: *Hart & Flower*.

Solicitors for defendants: *Macdonald-Paterson*.
Fitzgerald & Hawthorn.

JUNE SITTING OF THE FULL COURT.

REGINA v. LUM HOOK.

Crown Case Reserved—Jurisdiction—Northern Supreme Court—29 Vic., No. 13, ss. 48-49—38 Vic., No. 3, s. 7—53 Vic., No. 17, ss. 4, 11, 17—40 Vic., No. 2, s. 2—Perjury—

Judicial proceeding—Small Debts Act, (31 Vic., No. 29)—Non-amendment of proceedings.

The Full Court sitting at Brisbane, is the proper tribunal for a Crown Case Reserved by a judge of the Northern Supreme Court.

Section 2 of 40 Vic., No. 2 (*Criminal Practice Amendment Act of 1876*), is not impliedly repealed by *The Supreme Court Act of 1889*.

An action had been commenced in the Small Debts Court at Cairns, against Lum Hook and Chong Chow, trading together in partnership, for goods sold and delivered. The plaintiff abandoned the case against Chong Chow, and without amending the proceedings in any way, evidence was taken for the defendant, who in the course of his evidence, committed the alleged perjury. Judgment was given for the plaintiff against Lum Hook alone.

Held, that this was a judicial proceeding, and it was competent for the Court to proceed in the action after the abandonment against one defendant, and that the conviction for perjury should be sustained.

Case reserved by Chubb, J.:

1. The defendant Lum Hook was tried before me at the Circuit Court Cairns on the second day of April 1891 on an information for perjury.

2. The perjury was charged in the information to have been committed in the Court of Petty Sessions Cairns in its Small Debts Jurisdiction on the trial of an action in which one Long Lee was plaintiff and the defendant and one Chong Chow were defendants.

3. The following evidence was adduced by the Crown: The plaint summons and particulars of demand in the action were for £27 19s. 9d. for goods sold and delivered by plaintiff to Lum Hook and Chong Chow trading "together in partnership."—On the hearing after the plaintiff had given his evidence and before the alleged perjury was committed the plaintiff abandoned the case against Chong Chow whereupon and without having amended the proceedings in any way the Court proceeded to take evidence for the defendant. The defendant gave evidence and in the course of it made the statements upon which the perjury was assigned and judgment was given for the plaintiff against the defendant alone for the amount sued for.

4. Upon this evidence I reserved for the consideration of this Honorable Court two questions viz.:

(a) Whether after the plaintiff had abandoned the case against Chong Chow the action was as regarded the defendant a judicial proceeding.

(b) Whether after such abandonment it was competent for the Court to proceed further in the action against the defendant alone.

5. I refer the Court to sections 15 19 21 29 and 30 of *The Small Debts Act of 1867* which induced me to reserve the questions.

6. The jury found a verdict of guilty and I postponed judgment until the questions reserved had been decided and accordingly committed the defendant to the prison at Townsville where he now is.

7. I am in doubt whether the second section of *The Criminal Practice Act Amendment Act of 1876* has not been repealed by implication by *The Supreme Court Act of 1889*. As this is the first case reserved by a Northern Judge since the passing of the latter Act I have reserved it for the Court at Brisbane in order that the point may be considered. I request the decision of the Court upon the questions reserved.

(Signed) C. E. CHUBB, J.,
Northern Judge.

Chambers, Supreme Court,
Townsville, 29th April, 1891.

Byrnes, S.G., Scott with him, for the Crown.
There was no appearance for the defendant.

Byrnes: The question of jurisdiction is raised in this case, whether a Crown Case Reserved by a Northern Judge should be heard at Brisbane as heretofore, or at Townsville. *The Supreme Court Act of 1889* expressly repeals *The Supreme Court Act of 1874*, sections 15-21 inclusive, and the Act to amend *The Supreme Court Act of 1874*, (41 Vic., No. 17), but no mention is made of *The Criminal Practice Amendment Act of 1876*. By section 2 of that Act, a Crown Case Reserved by a Northern Judge, shall be heard by the Supreme Court sitting at Brisbane. The practice is regulated by sections 48 and 49 of *The Criminal Practice Act of 1865*, which require the case to be transmitted to the Judges of the Supreme Court. By section 7 of *The Supreme Court Act of 1874*, the Supreme Court is to be holden before three judges, except under certain circumstances. By section 17 of *The Supreme Court Act of 1889*, the word Townsville is to be substituted for Brisbane. But this is only a qualified provision. On the ground of convenience, there can be no doubt the cases should be heard in Brisbane, otherwise there might be a difference of opinion between the two judges, and a divergent criminal practice exist in two parts of the colony. There is no provision for an appeal from Townsville to Brisbane in criminal matters. [HARDING, J.: There is no appeal in a Crown Case Reserved.] Section 11 of the same Act, excepts jurisdiction on appeal from a decision of a judge of the Supreme Court, and section 4, excepts any appellate jurisdiction vested in the Full Court at Brisbane.

THE CHIEF JUSTICE: That decides the question.

Section 2 of *The Criminal Practice Act of 1876* is not repealed. The appellate jurisdiction in criminal cases, rests with this Court alone

Byrnes: As to the merits, the difficulty of the judge seems to have been whether there was a judicial proceeding, as the proceedings had not been amended. [HARDING, J.: The question is simply—Can an action proceed against one defendant when a non-suit is granted to another?] The defendants were in partnership. [THE CHIEF JUSTICE: That makes no difference.] The points reserved are within the words of Denman, J., in *Reg. v. Hughes*, 4 Q.B.D., 614, at 637—"I am of opinion, however, that we ought not to have regard to the conviction, in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether at that moment, the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially, if, at the time at which it was given, it was evidence which in any possible event, they might have acted upon judicially in a matter within their jurisdiction; whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency."

THE CHIEF JUSTICE: We think this was a judicial proceeding, and if the false evidence given was material, that there was perjury. We answer question A, yes; and question B, yes. The conviction is sustained. Let the judge give judgment.

Solicitor for the Crown: J. Howard Gill.

FRITCHARD & HOWARD SMITH AND SONS, LIMITED.
Company—Jurisdiction—Employers' Liability Act
(50 Vic., No. 24), sec. 10—*Residence—District Court Act, 1867*, (31 Vic., No. 30), ss. 40, 41, 55—*Rule 38—British Companies Act*, (50 Vic., No. 31), ss. 3-9, 16—*Costs—O. LIV, r. 1.*

A company registered in Victoria, but having a branch office here, is a person resident within the district, under sec. 40 of *The District Court Act of 1867*, and is amenable to the jurisdiction of the District Court, under section 10 of *The Employers' Liability Act of 1886*.

Held, affirming the decision of Harding, J., that an action in the Supreme Court against such a company for damages, under *The Employers' Liability Act*, was rightly dismissed with costs, for want of jurisdiction.

APPEAL from a decision of Harding, J.

This action was brought by the plaintiff, a wharf labourer, against the defendants, for damages for injuries sustained whilst in their employment. The trial came on before Harding, J., at the March Civil Sittings of the Supreme Court.

Power and Woolcock appeared for the plaintiff, *Lilley* for the defendants.

Lilley objected that the Court had no jurisdiction, and that the action should have been brought in the District Court, under section 10 of *The Employers' Liability Act of 1886*.

Power referred to section 40 of *The District Court Act, 1867*. The defendants were not resident here. The head office was in Victoria, where the company was registered.

After argument, Harding, J., ordered the case to be put at the bottom of the list, and reserved judgment, which was subsequently delivered.

HARDING, J.: The plaintiff sues the defendants, William Howard Smith & Sons, Limited, for damages for injuries, to which he is only entitled, by means of *The Employers' Liability Act of 1886*, and we find it is necessary to allege that the defendants are not amenable to the jurisdiction of any District Court in the colony. Part of section 10 of *The Employers' Liability Act of 1886*, reads:—

Every action for recovery of compensation under this Act shall be brought in a District Court unless the defendant is a person or corporation not amenable to the jurisdiction of any District Court in the colony.

With the rest of the section we have nothing to do.

I have decided that the defendants are amenable to the jurisdiction of the District Court in Brisbane.

To find out whether they are amenable or not,

we have to refer to section 40, *District Court Act, 1867*, which reads:—

The several Courts appointed to be held at towns and places within such districts respectively shall have jurisdiction when the defendant or one or more defendants as the case may be shall be resident within the districts for which such Courts respectively shall be ordered to be held. Provided that no defendant except as hereinafter provided shall be compellable to appear except at the nearest District Court held under this Act to the Petty Sessions District in which he shall be resident.

So that there the liability to the jurisdiction of the District Court is residence.

By section 55 of the same Act, a plaint having been lodged—

A summons stating the substance of the action and bearing the number of the plaint on the margin thereof shall be issued under the seal of the Court according to such form and be served on the defendant at such time and in such manner as shall be directed by the rules made for regulating the practice of the Court in the Act thereafter provided for.

Having obtained a summons, can he serve it under the rules made thereunder? I think rule 38 applies. It reads—

The service of the summons except in the cases hereinafter specially provided for shall be either personal or by delivering the same to some person apparently fourteen years old at the house or place of dwelling or place of business of the defendant but no place of business shall be deemed the place of business of the defendant unless he shall be the master or one of the masters thereof.

"Resident" would mean place of business, but I derive assistance in interpreting that word from the proceedings of the Court here and in England, upon the question of service of writs here. A writ is served by service at the residence, and for that purpose, it is necessary to determine what residence is, and under *The Companies Act*, foreign companies can be wound up here. See 5 *Edn. Buckley*, at page 204.—

It is no bar to the jurisdiction of the Court to wind up a company that all the operations of the company are in a foreign country if the management be in this country and the business or a branch of the business be transacted here. An order has been made to wind up a company incorporated by registration in India having its principal place of business in India with a branch office and a manager in England so again in the case of a New Zealand company and an Australian company.

This company can be wound up because it is

resident here. It is resident within the jurisdiction of this Court by a branch office. There is a further decision in the case of *Lloyd Generale Italiano*. It is in 29 C.D., 219. There, Pearson, J., says referring to *Companies Act of 1862*—

I am decidedly of opinion that the Act is confined to English companies and foreign companies carrying on business in England with so to speak a residence of their own branch office in this country. In the cases which have been cited of orders made to wind up foreign companies the companies had an office in England but that is not so in the present case.

Then there are the cases that were cited on the service of English writs on foreign companies, *Newby v. Von Oppen* and *The Colts Patent Firearms Manufacturing Company*, 7 L.R., Q.B. 293. The facts there are very similar to these, and the judge, Blackburn, J., says at page 295—

The other and more difficult question is whether the corporation has been properly served supposing them to be suable. It was argued that the American corporation was resident in America and must be served if at all as a foreigner resident out of the jurisdiction subject to the difficulties which are pointed out in *Ingate v. Austrian Lloyd's Company*. This would be so if the foreign company had merely employed an agent here who made a contract for them but we think it is different where the foreign corporation actually has a place of business and trades in this country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case that there is at least one American corporation that has set up a branch business and there will probably be some more. Such a corporation does for many purposes reside both in England and in its own country. In the case of *Carron Iron Company v. MacLaren* Lord St. Leonards taking a different view of the facts from that taken by Lords Brougham and Cranworth thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. He says "If the service on the agent is right it is because in respect of their house of business in England they have a domicile in England and in respect of their manufactory in Scotland they have a domicile there. There may be two domiciles and two jurisdictions and in this case there are as I conceive two domiciles and a double sort of jurisdiction one in Scotland and one in England and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other." The majority of the lords took a different view of the facts and thought that though the corporation possessed property in England and had agents there they did not carry on business there but we do not find that they differed from Lord St. Leonards' view of the law if they had agreed as to his facts and in the

present case the fact is clear that the American company are carrying on trade themselves in London and therefore we think must be treated as resident there.

Then there is the last case, *Haggin v. Comptoir D'Escompte de Paris, Mason and Barry v. the same*, 23 Q.B.D., 519. Cotton, L.J., says—

It has established in London an office on the door of which the name of the company appears and on their bills and memorandums used in London the same name is printed.

and then at page 522—

The question therefore comes to this—Is the corporation resident in this country? I think it is. The principal parts of its business is carried on at the office in London and I think that when a foreign corporation established by foreign law sets up an office in England and carries on one of the principal parts of its business here it ought to be considered as resident in England and be treated as if it were established by English law. In my opinion that is the law independently of all decisions but the case of *Newby v. Van Oppen* is an authority for that view. Fry, L.J., says—"I am of the same opinion. It is not necessary to refer to the earlier authorities because in *Carron Iron Company v. MacLaren* which was decided in 1855 Lord St. Leonards in the House of Lords laid down that a corporation might have two domiciles and be subject to two jurisdictions. It is true that the other learned lords differed from Lord St. Leonards on the facts of the case but they did not dissent from the principle of law which he laid down. That principle appears to me to have been followed in subsequent cases."

I think the present case is really controlled by *Newby v. Van Oppen*, and that we cannot determine it in favor of the defendants, without overruling that authority.

On the English cases, a foreign company can be resident within the jurisdiction of the Supreme Court at Brisbane, for the purpose of being wound up, and if it is resident there, it can be sued there. The same word is mentioned in *The District Court Act of 1867*. There is also the case decided by The Chief Justice; the case of *Neville v. National Fire and Marine Insurance Company*, 1 Q.L.J., 23.

In that case, the writ was a writ issued for service within the jurisdiction. It was served upon the officer of the company who had an office there, who had the name on the door, and on similar facts stated to the Court on service, as those in this case; but no appearance being entered, the parties applied for substituted service by serv-

ing it on the manager, before The Chief Justice. Now The Chief Justice directed and gave leave for such service. He could not, on the ground that the defendants were liable to a writ for service not within the jurisdiction, because there is no such thing as substituted service of a writ for service out of the jurisdiction, and that being so, His Honor must have decided that that company had its residence in Brisbane. Consequently, if the company can be resident in Brisbane, this company is resident and carrying on business in Brisbane; and if so, it answers to the word in *The District Court Act*, "resident," and consequently, the defendants are liable to be sued there.

Lilley moved for a non-suit.

Power moved for the case to be struck off the paper.

HARDING, J., dismissed the case for want of jurisdiction, with costs.

The plaintiff appealed from this decision.

Byrnes, S.G., Power and Woolcock, for the plaintiff. *Griffith, Q.O., A.G., and Lilley*, for the defendants.

Byrnes, S.G., applied to have the judgment of *Harding, J.*, reversed, and that the case might be reinstated for trial at the next sittings of the Court. The questions for the Court to decide, were (1), Were the defendants a corporation not amenable to the jurisdiction of the District Courts of the colony, or in other words, had the Supreme Court jurisdiction to hear the case? (2), If the judge had no jurisdiction, was the form of the judgment correct, in so far as the action was dismissed with costs against the plaintiff? Section 10 of *The Employers' Liability Act* states, that such actions are to be tried in the District Court, but in a similar case against the same defendants, it was held that the District Court had no jurisdiction. By section 40 of *The District Court Act of 1867*, the defendant must be resident within the district. A man cannot be resident in more than one place at a time, and so with a corporation. A party may by section 41, become resident by removal. Section 9 of *The District Court*

Amendment Act of 1872, and section 2 of *The Amendment Act of 1878*, were cited as to the meaning of the word "reside." [REAL, J., referred to section 127 of the Principal Act, and Rule 44.] Rule 38 shews how service is to be effected. Under *The District Court Act*, carrying on business is not residence. A joint stock company resides at its registered office. The defendants are not registered here, but in Victoria. *The British Companies Act of 1886*, section 2, defines a British company; section 3 allows such a company to be registered here; sections 4, 5, 6, shew the mode of registration; section 7, the effect of registration as if incorporated in Queensland; section 9 deals with service of writ, and at the registered office. By section 16, the jurisdiction of the Supreme Court is not to be diminished by the provisions of the Act. By *The Acts Shortening Act*, section 11, the word "person" includes a body corporate. The company being registered in Victoria, cannot be sued in our District Court. *Aberystwith Promenade Pier Company v. Cooper*, 35 L.J., Q.B. 44. In *Jones v. Scottish Accident Insurance Company*, 17 Q.B.D., 44, the company was registered in Scotland, and had a chief office in London, but was held not to be resident or domiciled there. [HARDING, J., referred to *Haggin v. Comptoir de Paris*, 23 Q.B.D., 519; *Russell v. Cambefort*, *ibid*, 526; and *Newby v. Van Oppen*, L.R. 7, Q.B. 283.] As to costs, by *The Supreme Court Act of 1867*, section 58, the Supreme Court has power to award costs in all cases "lawfully" brought before it. If the Court had no jurisdiction, Mr. Justice Harding had no power to award costs. *Lauford v. Partridge*, 26 L.J., (Exch. 147); *Cox v. Hawkes*, 15 Ap. Ca., 521, per *Halsbury, L.C.*, and per *Bramwell, L.*, at p. 526. *The Judicature Act* does not give power to give costs when there was no power before. *Re Mills' Estate*, 34 Ch.D., 24; *Brown v. Shaw*, 1 Ex.D., 425.

Power pointed out there was no machinery to enforce a judgment given in the District Court against a foreign company, while *The Australasian Judgments Act of 1886*, provides a means of en-

forcing a judgment of the Supreme Court. The fact that the company had assets here, was a mere accident. On the authority of Denman, J., in *Castrioni's case*, (1891), 1 Q.B., 155, the speech of Sir Samuel Griffith, as a great political authority, on the passing of *The Employers' Liability Act*, was quoted to shew that the words "unless the defendant is a person or corporation not amenable to the jurisdiction," were intended to apply to a foreign company.

Griffith, Q.C., A.G., in reply, was requested by the Court to confine his remarks to the question of costs. The writ was issued by the Supreme Court. The cause of action is cognizable in the Supreme Court. This was a lawful bringing before the Court. The Court has jurisdiction to deal with all matters brought before it, but not so in case of a limited jurisdiction. *Dreyfus v. Peruvian Guano Company*, 41 Ch.D., 151; *In re Bourgoise*, 41 Ch.D. 810; *The Supreme Court Act*, section 58, applies to every case brought into Court.

LILLEY, C.J.: This action has been brought by a workman against his employer, to recover damages under an Act which was passed ostensibly for the special relief of workmen who may receive injuries in the course of their employment, through the carelessness or negligence of their employers; and the Court is bound by the terms of that enactment. Under section 10 of *The Employers' Liability Act of 1886*, 50 Vic., No. 24, it is enacted that—

Every action for recovery of compensation under this Act shall be brought in the District Court unless the defendant is a person or corporation not amenable to the jurisdiction of any District Court in the colony.

There is of course, no doubt that the defendants here are a corporation, and as far as this colony is concerned, a foreign company, as they are a Victorian company, which is foreign to us, not having any status by law within this colony of Queensland. The first question is, whether this is a corporation amenable to the jurisdiction of the several District Courts of the colony. That depends upon the construction of the Statute

creating the districts in this colony. Section 40 enacts—

The several Courts appointed to be held at towns and places within such districts respectively shall have jurisdiction when the defendant or one of two or more defendants as the case may be shall be resident within the districts for which such Courts respectively shall be ordered to be held.

This means that a corporation cannot be said to reside anywhere; a man might; but it must be by legal conception to say that a corporation resides anywhere. Residence with regard to corporations, had been held in England, to be where the head office was situated, and that appears to be the defence in the two cases cited: *Haggin v. The Comptoir D'Escompte de Paris*, 23 Q.B.D., 519; and *Newby v. Van Oppen*, L.B., 7 Q.B., 283. In this case of *Pritchard v. Howard Smith & Sons*, in Victoria, the company would be held to reside in Melbourne, the head place where all their business is managed, is registered there, and is native to the place, so to speak. But here the Company trades largely within our jurisdiction, although not registered in Queensland; but the principle upon which these cases have proceeded, that a foreigner coming within the jurisdiction and carrying on business as a foreign company, must for the purposes of restraint, if they commit any wrong act, hold in this case. The defendants must be held to be within our jurisdiction. The evidence before my brother Harding, is this: that the manager, who was also a director of the company, managed the business in Queensland. He said: "I am a director of defendant company, and manager in Queensland. I live in Brisbane and manage the Brisbane business. The Queensland business is managed from Brisbane. The company has offices in Brisbane at the Municipal Wharves, Petrie's Bight. The company's name is up there—'Wm. Howard Smith & Sons, Limited,'—and the note paper used there was not used at any other office." So the other offices are simply agents for the loading and unloading of the company's vessels. The whole of the Queensland business of the company is carried on from Brisbane. On the principle of

these cases, then, I think the company resides in Brisbane, and that being so, it was amenable to the District Court in Brisbane. Then *The Employers' Liability Act* requires that the action be taken in the District Court, and not in the Supreme Court; and my brother was right in holding that, as the company was amenable to the District Court, the Supreme Court had no jurisdiction, and the action was properly dismissed. With regard to the costs, it has been urged and supported by some authorities, of which I need say nothing, that when a judge dismisses an action for want of jurisdiction, he ceases then to have any office beyond that, and cannot award costs to any party brought before his tribunal. I have a strong opinion on the matter, and think that the question of jurisdiction, before it can be determined, must be tried; and the person who placed that burden upon the Court, and who set the law in motion improperly, should pay the costs. I have known costs awarded in inferior Courts when the plea of jurisdiction has been tried. In Courts of limited jurisdiction, which can only deal with small sums, it was necessary to plead to the jurisdiction. The defendant must deny the jurisdiction of the Court, and that is a matter of evidence which the plaintiff must lead in the first instance, to show that the contract that had been made the cause of the action which was to be tried, was one in which the Court had jurisdiction to try the matter. It was necessary that the parties should come to the Court to try that matter. Mr. Justice Harding had jurisdiction to try it, given him by our own *Supreme Court Act of 1867*, section 58, which provides that the judge shall have power to order costs in all cases that are lawfully brought before the Court. This case was lawfully brought before the Court; if it was a matter which required the decision of the judge, as I think it was, certainly it was lawfully brought before the Court. In what sense can it be said to be unlawful for a judge to try whether a Court has jurisdiction or not. Plaintiff had a right to compel the defendants to show that they were in the

jurisdiction, or that they were entitled to be heard. I think it was a lawful matter to bring before the Court, and my brother Harding was right in granting costs. *The Judicature Act*, Order 54, also gives power to grant costs in all proceedings, and that complied with the authority of the Supreme Court, but seems to me to give the judge ample authority to do as he did: first to declare that the company were amenable to the District Court; and therefore, the case was not triable before him; that he ordered the action to stand dismissed with costs, and this appeal should be dismissed with costs also.

HARDING, J.: This matter was brought before me after the proceedings in the Court below. I had plenty of opportunity for considering my judgment, and I am still of the same opinion as I expressed then, and which has been referred to by The Chief Justice. I do not propose to give any more formal judgment.

REAL, J.: I am of the same opinion. The only question of doubt, was that of residence; whether the corporation could be resident in two countries, and the case of *Haggin* is an authority on that point. Here, this is as strong a case. It is not necessary that all the powers of the corporation should be exercised from the office situated in Brisbane, only that a substantial part of the business be transacted in this colony. The corporation thus having constructive residence in this colony, within the jurisdiction of the District Court, the Supreme Court could not try the case, but the question of amenableness must be decided by the judge, and must be tried by him. Under the circumstances, it cannot be said that it was not a matter lawfully brought before him. In my opinion, the appeal should be dismissed with costs.

LILLEY, C.J.: Let the appeal be dismissed with costs.

Solicitors for plaintiff: *Thynne & Goertz*.

Solicitors for defendants: *Chambers, Bruce & McNab*.

IN THE MATTER OF *The Real Property Acts of 1861 AND 1877.*

Real Property Act of 1861, sec. 91—Fi. fa.—Registration—Sale by sheriff—Priority of title.

The words "executed and put in force within three calendar months from the date of entering such writ," in section 91, signify only the sale of the land by the sheriff, within the time specified, and do not require that a transfer of the land by the sheriff should be produced for registration within that time, but priority may be lost otherwise. Land sold by the sheriff under a *f. fa.*, within three months from the date of entry of the said writ on the Register, is not bound by the writ as against a purchaser from the registered proprietor, who has lodged his memorandum of transfer before the purchaser from the sheriff.

SPECIAL case stated by the Master of Titles, under section 14 of *The Real Property Act of 1861*, with reference to allotment 18, of section 13, situate in the county of Banks, parish of Cook, and town of Cooktown, and being the land described in the certificate of title, number 36,427.

1. On the 29th day of July 1889 Robert Drayton Lord was seized in fee and the registered proprietor of the said allotment 18 of section 13.

2. On the date last aforesaid a writ of *feri facias* issued in pursuance of a judgment of this Honorable Court and directed against the lands of the said Robert Drayton Lord was produced for registration at the office of the Deputy Registrar of Titles at Townsville and was entered in the Register book upon the duplicate of the said certificate of title of the said land on the 14th day of August 1889 in accordance with the provisions of section 91 of *The Real Property Act of 1861*.

3. On the 9th day of September 1890 a memorandum of transfer purporting to have been executed by the said Robert Drayton Lord on the 10th day of January 1882 and purporting to transfer all the estate and interest of the said Robert Drayton Lord in the said land to John McLean as purchaser thereof was produced for registration at the office of the said Deputy Registrar of Titles but the said writ of *feri facias* was not endorsed on the said memorandum of transfer as an encumbrance or otherwise.

4. On or about the 25th day of September 1890 the entry of the said writ of *feri facias* in the said Register book was marked lapsed by the direction of the Master of Titles but additional facts having come to light such marking was subsequently cancelled by his further direction.

5. The registration of the said memorandum of transfer was not proceeded with by the said Deputy Registrar of Titles in consequence of the purchaser's inability to show that the land had not been sold by the sheriff in satisfaction of the said writ within a period of three months

from the date of the entry of such writ upon the said certificate of title.

6. On the 27th day of October 1890 a memorandum of transfer under *The Real Property Act of 1877* purporting to have been executed by the Sheriff of Queensland in pursuance of the said writ and purporting to transfer all the estate and interest if any of the said Robert Drayton Lord in the said land to Archibald Anderson as purchaser thereof was produced for registration at the office of the said Deputy Registrar of Titles.

7. The said lastmentioned memorandum of transfer was accompanied by a statutory declaration made by the said sheriff averring that in the pursuance of the said writ of *feri facias* and in execution thereof he had on the 26th day of September 1889 sold the said estate and interest if any of the said Robert Drayton Lord in the said land to the said Archibald Anderson.

8. The registration of the said memorandum of transfer in the last preceding paragraph hereof mentioned was not proceeded with by the said Deputy Registrar of Titles but on the 20th day of December 1890 the said purchasers were each informed of the intention of the Registrar of Titles and the Master of Titles to state a special case for the opinion of this Honorable Court as to their respective claims to registration.

9. The Registrar of Titles and the Master of Titles are doubtful having regard to the provisions of section 91 of *The Real Property Act of 1861* as to which of the two aforesaid memoranda of transfer is entitled to priority.

The questions submitted for the opinion of this Honorable Court are :—

1. Do the words "executed and put in force within three calendar months from the date of entering such writ" being the concluding words of the said section 91 signify only the sale of the land by the sheriff within the time specified or do the said words require that a transfer of the land by the sheriff should be produced for registration within that time?

2. Having regard to the fact that the land in question was sold by the sheriff within three months from the date of entry of the said writ on the Register does the said writ still bind the land as against the said purchaser from the registered proprietor?

Dated the first day of June 1891.

J. O. BOURNE, Registrar of Titles.

E. GORE-JONES, Master of Titles.

Fitzgerald for Archibald Anderson, *Pain* for McLean.

The Court expressed an opinion that the Master of Titles ought to be represented in case any question might arise as to the custom of the Real Property Office in registering instruments.

Fitzgerald: The words "executed and put in force within three calendar months from the date of entering the writ of execution," used in sec. 91 of *The Real Property Act of 1861*, signify

only the sale of the land by the sheriff within three months, and do not require that a transfer should be produced for registration within three months. Section 91 is similar to the English Act, 23 and 24 Vic., c. 38, section 1, where no subsequent registration of the transfer from the sheriff is required. Section 106 of *The Victorian Land Transfer Statute*, was also cited. McLean must take subject to the *f. fa.*, and must have the *f. fa.* endorsed as an encumbrance on his title and transfer. As the transfer dates from the time of its production for registration, by section 15 of *The Real Property Act of 1877*, McLean's memorandum of transfer from Lord not having the *f. fa.* endorsed on it, was not correct for the purpose of registration, and the Registrar was therefore correct in refusing to register it. The Registrar must take the register as it is; he has no authority to determine questions of priority. *McGlone v. The Registrar of Titles*, 2 Q.L.J., 182; *Perkins v. The Registrar of Titles*, 3 Q.L.J., 47.

Pain was not called upon.

THE CHIEF JUSTICE: I answer the first question, as far as the word specified, in the affirmative; but if the transfer from the sheriff is not brought in for registration within three months, priority may be lost. The answer to the second question is no.

HARDING, J.: The answer to question 1 is yes, but the right may be lost, as in this case. Question 2, no.

REAL, J., concurred.

Solicitors for Anderson: *Hamilton & Hamilton*.

Solicitors for McLean: *Hart & Flower*.

NORTHERN SUPREME COURT, TOWNSVILLE.

CHUBB, J.: June 5th and 11th, 1891.

ISABELLA KING (EXECUTRIX OF THE ESTATE OF EDWARD JAMES KING, DECEASED,) v. AUSTRALIAN JOINT STOCK BANK.

Setting off judgments—Costs—Solicitor's lien.

The plaintiff recovered judgment for the return of certain specific articles — damages and costs; the defendant on the counterclaim, for a debt owing by the deceased. On an application that the judgment by the defendant might be set off *pro tanto* against the judgment for costs obtained by the plaintiff upon the claim:

Held, that the judgments could not be set off. *Lambarde v. Older*, 17 Beav., 542, followed.

Held, also, that even if the judgments could have been set off, the Court on the principle of *Simpson v. Lamb*, 26 L.J., Q.B., would not under the circumstances of the case, have allowed it, except, subject to the lien of the plaintiff's solicitor for his costs.

THIS was an application heard before Mr. Justice Chubb, on 5th June, that the judgment for debt, obtained by the defendant upon the counterclaim, might be allowed to be set off *pro tanto* against the judgment for costs obtained by the plaintiff upon the claim, and that satisfaction of the plaintiff's judgment, and of an equal amount of the defendant's judgment, might be ordered to be entered upon the roll.

Macnaughton for plaintiff; *Jameson* for defendant.

The facts and arguments appear from the judgment.

After hearing counsel, His Honor reserved his decision, and on the 11th of June, delivered the following written judgment:

In this action, the defendant has applied to be allowed to set off against the plaintiff's judgment for costs upon the claim, *pro tanto* the defendant's judgment for the debt upon the counterclaim, and for an order to enter upon the roll satisfaction of the plaintiff's judgment, and *pro tanto* satisfaction of the defendant's judgment accordingly. There are two questions here to be determined—first, whether there can be a set off of judgments in this case; second, if so, whether such set off ought to be allowed.

On the first point, the debts must be shown to be mutual, and they must be substantially between the same parties. It appears to me that a statement of the facts will clearly show that neither of these conditions exists here. The plaintiff brought this action in her representative character, for a wrong done to the estate after the death of the

testator. It was about what was formerly and technically called an action of detinue. The defendant after the testator's death, wrongfully detained, after demand by the executrix, a box containing policies of insurance, title deeds of land, and other documents of title to property of the testator's estate. The statement of claim would have equally covered an action of trover. The defendant refused to deliver up the property, claiming a lien upon it, and alleging that it had been pledged by equitable deposit by the testator, as security for an overdrawn account with defendant. The defendant also took advantage by our procedure, to counterclaim for the overdraft. Before *The Judicature Act*, this could only have been done by a separate action. The trial resulted in a verdict and judgment for the plaintiff upon the claim for damages, one shilling, a return of the property in specie, and costs of the action taxed at £11, and a verdict and judgment for the defendant upon the counterclaim for the overdraft, (£800 odd) against assets *quando accederint*, and costs of the counterclaim which have not been taxed. The defendant now claims a set off of his debt against the plaintiff's costs. In the language of Romilly, M.R.—“This is clearly not a case of mutual debts, for in point of fact a debt due to the legal personal representative, is sought to be set off against a debt due from the intestate. Those are debts in totally distinct rights, and cannot with propriety be set off one against the other — *Lambarde v. Older*, 17 Beav., 542.” Change the word “intestate” to “testator,” and this passage fits the present case completely. The principle as to set off is fully laid down in *Shipman v. Thompson*, Willes 103, and according to the authorities, this action might have been brought by the executrix in her own name, or as executrix. If she had brought it in her own name, no question of set off could possibly have arisen, and I do not see that having brought it as executrix, makes any difference in this case; because the right of action accrued subsequently to the death of the testator, and is so stated in the pleadings. *Lambarde v. Older*, at p. 545.

The right of set off, therefore, does not in my opinion, arise at all in this case.

As to the second point. The right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of the Court with reference to all the circumstances of the transaction. *Simpson v. Lamb*, 26 L.J., Q.B. 121. If allowed, Mr. Macnaughton contends, on the authority of *Simpson v. Lamb*, that it should be subject to the plaintiff's solicitor's lien for costs. Mr. Jameson contra, cites *Pringle v. Gloag*, L.R. 10, Ch.D. 676, and maintains that the lien should not be recognised. Where the set off is asserted in the same action, the practice in England is now regulated by rule 14, of Order 65 of the 1883 rules, which is not in force here. Even there under the new rule, the disallowance of the solicitor's lien is discretionary. (See *Edwards v. Hope*, L.R. 14, Q.B.D., 922, C.A.) So far as Queensland is concerned, it seems to me that the practice as to such lien existing before *The Judicature Act*, still remains. The only rules I can find on the subject, are Order 5, Spec. All, r. 19; *Harding*, 732, and G.R. 14; *Harding*, 966; old rule 63 of Hilary, 1858. By the former, there may be a set off of costs in the same action. (Nothing is said there about solicitor's lien). By the latter, no set off in separate actions, without prejudice to the solicitor's lien, is to be allowed. It seems to me, therefore, that the old practice prevails here, and that in each case it is for the Court to make such order in the particular case as it thinks just. In *Cox, Dowling & Co. v. Jones*, 4 Q.L.J., 61, The Chief Justice recently gave the costs on the claim and counterclaims, and ordered them to be taxed as if each had been a separate action, and to be then set off. The question of solicitor's lien was not raised there, and by the form of the judgment, it certainly was not recognised. But that is not conclusive against it. Order 19, rule 3, says that a counterclaim is to have the same effect as a statement of claim in a cross action. So that, although under the present practice where there is claim and counterclaim, judgment is entered for the balance, and costs are

generally set off. There is nothing to prevent the Court, I think, from protecting the solicitor's lien in such an action, if it think it just to do so. As, therefore, the matter rests in the equitable discretion of the Court, what equity has the defendant shown here? By the wrongful detention of the property, the administration of the estate was delayed for nearly a year, interest was running on upon the overdrawn account, and the executrix was compelled to bring an action to get possession of the property. She incurred personally the risk, on failure, of costs, in case the estate should be insufficient, although, if ever there was a case in which an action was justified, this was one. She has, no doubt, incurred some solicitor and client costs, caused by the improper defence, which the defendant cannot be made to pay. And if (as the defendant alleges the estate cannot pay the debts in full) I were to allow the set off, I should not only, by allowing the defendant to take payment *pro tanto* in full, be actually enabling a person to take advantage of his own wrong, but by thus diminishing the fund I should deprive the creditors of their right to an equal division of the estate, and I should further impose upon the plaintiff a personal liability to pay so much of the costs as the estate failed to satisfy.

In *Edwards v. Hope*, at page 925, Cave, J., says—"It is for the plaintiff asking for equitable interference, to show that equity is in his favour. I am quite clear that in a case like the present, the equitable considerations are not at all in favour of the set off," and then he goes on to say that the action had been wrongly and unsuccessfully brought, etc. In the present case, the defendants, in my opinion and of the jury also, as testified by their verdict, wrongly and unsuccessfully defended the action. If, therefore, this were a case in which the right of set off arose, I should certainly not allow it, except subject to the lien of the plaintiff's solicitor for his costs. The summons, therefore, will be dismissed, and as the defendant fails on the application, with costs.

Solicitor for plaintiff: *W. E. Evans*.

Solicitors for defendant: *G. A. Roberts and Leu*.

MARCH SITTINGS OF THE FULL COURT, 1888.*

NEW ZEALAND LOAN AND MERCANTILE AGENCY COMPANY, v. H. AND J. HOWES.

Contract—Executed or executory—Sale by sample—Misrepresentation—Rescission—Equity—Judicature Act.

The defendants contracted with the plaintiffs to purchase a certain quantity of chaff, according to sample, at the rate of five guineas per ton net, the terms being a promissory note at one month. The chaff tendered was not according to sample, and the defendants refused to take delivery, and elected to rescind the contract. The plaintiffs represented that the chaff was of like kind and quality to the sample. The plaintiffs did not know the representations were incorrect at the time of making the contract, but did so before the action was brought.

Held, (affirming the judgment of Harding, J.,) that the defendants were entitled to rescind the contract.

Held, further, that an innocent material representation which was false in fact as to kind and quality, is a ground for rescission of a contract on failure of consideration. And since *The Judicature Act*, if equity provides a remedy and the common law none, or the relief in equity is more complete, the rule of equity is to prevail; in this case on equitable grounds alone, the contract ought to be rescinded.

Redgrave v. Hurd, 20 Ch.D., 1, followed.

ACTION before Harding, J., and jury.

A contract had been entered into between the parties, on the 18th August, 1887, under which the defendants undertook to purchase 792 bags of chaff, weighing 26 tons, 17 cwt., 3 qrs., ex s.s. "Wakatipu," at the rate of five guineas a ton net, the terms being a promissory note at one month. The defendants declined to give the promissory note, contending that the sale was by sample, and the goods were not equal to sample; that until delivery, the chaff should have been taken care of by the plaintiffs, and stored at their risk; that it was not so stored, and was allowed to get wet.

Griffith, Q.C., and *Lilley*, for the plaintiffs; *Real and Byrnes*, for the defendants.

HARDING, J., in summing up, directed the jury that the whole question practically was whether the contract was or was not executory. The contract was composed of the sale note and agree-

* This case was omitted from the 1888 Reports by an oversight.

ment, and there was a subsequent question: Was the sale by sample? The jury might say the contract was contained in the two documents, and then add that the sale was by sample. If the jury should affirm that the contract was contained in the two documents, and then say yes to the question, was the sale by sample, then that would mean that the contract was as given *plus* the sale by sample. A sale by sample, is a sale made upon the exhibition by one party to the other, of a small quantity selected from the bulk of a larger quantity, which fairly represented the bulk, and which was intended by the parties to be taken into their contract, and to form another contract by a physical object, instead of by words, a description of the material which the one party bought from the other. Then was the chaff of similar quality to the sample? If there was not a sale by sample, it would not matter; but if there was, then they had to consider whether it was to be similar. As to whether the chaff until delivery was to remain at the plaintiffs' risk, the general rule would be: where a contract is executed by which property passes, the right direction would be, that the goods remained at the risk of the person in whom the property was; but where the contract was executory, then it at once became at the risk of the buyer. Was this chaff until delivery to remain at the plaintiffs' risk? Certain evidence of usage had been brought before the jury. Custom sometimes became incorporated with the law of the land; but usage had not arrived at that stage. Usage must, in the same way as a custom, be a reasonable thing that must be so well known in the business in which it was used, that parties engaged in that business, would know that the contracts they made would, unless they specifically protected themselves, be treated by those they were dealing with as subject to the usage. So notwithstanding in this case there were no words to show on whom the risk rested, yet the community of merchants might have been accustomed to deal with each other in such a way, that in such a contract, there would be an implied condition to the effect that the risk would be on one

of the parties. If such usage had been proved, were the goods until the delivery to remain at plaintiffs' risk? The defendants say they were induced to enter into the contract under the belief that the chaff was according to sample. The plaintiffs ought to take such care as reasonable persons would take of the chaff. The law did not expect perfection. As to negligence, if there had been insufficient care, plaintiffs would be liable. As to damages, if there had been a breach of the contract by the plaintiffs, the jury were asked to assess the damages. The amount sued for, £141 3s. 2d., and the plaintiffs claimed interest at 8 per cent.

A number of questions were put to the jury, who found there was a sale by sample; that the chaff was to be of a similar quality to the sample; that it was to be delivered in good order and condition, and that by reason of usage, it was to remain until delivery at plaintiffs' risk; that the plaintiffs, in order to induce the defendants to purchase, exhibited a sample, and represented to the defendants that the chaff was of a like kind and quality; that the chaff was not substantially according to sample; that the defendants were induced to buy under a belief in the truth of the plaintiffs' representations; that the defendants were not ready and willing to take delivery on the 22nd August; that the plaintiffs were ready and willing to deliver the same; that the chaff tendered was not according to sample; that the chaff was partially unmarketable and useless to the defendants; that thereupon the defendants refused to accept the same, and elected to rescind the contract and give notice to the plaintiffs; that there was no negligence on the part of the plaintiffs; and that the defendants suffered no damage; that the price under the contract was £141 3s. 2d.; interest was allowed at 8 per cent.; that the difference between the agreed price and the market value of the chaff at the time of the breach, was £60; that there was short delivery of 21 bags, and £3 14s. 11d.

Lilley moved for judgment for the plaintiffs for £137 8s. 8d., with interest. The contract was

executed for the sale of a specific parcel of chaff. The jury found that the plaintiffs were ready and willing to deliver. The jury found the plaintiffs had not been guilty of negligence; they had taken proper care. The finding is in their favour that they did not tender a less quantity or weight. The chaff was only in part unmarketable.

Real moved for judgment for the defendants. There seemed to be no action. The jury found, first, that the injury was sustained before the contract to purchase at all; and secondly, the defendants were entitled to reject the chaff on the principle laid down in *Redgrave v. Hurd*, 20 Ch.D., 1; and before the action was brought, the plaintiffs knew the chaff was not as represented. It was a clear case of recklessness on the part of the plaintiffs, and a man ought not to gain a benefit by fraud. On that judgment, the defendants should be allowed to rescind the contract, and judgment should be for them.

HARDING, J., then by consent, put the following questions to the jury:

31. Did the plaintiffs at the time they showed the sample, know it to be not substantially of the like kind and quality with the parcel? No.
32. Were the plaintiffs culpably ignorant, (that is reckless or careless), whether it was so or not? No.
33. Had the plaintiffs the knowledge inquired after in question 31, before the action was brought? Yes.

Judgment was then entered for the defendants.

At the December Full Court, 1887, *Griffith, Q.C.*, *Lilley* with him, moved for a rule *nisi* to set aside the judgment for the defendants, and enter judgment for the plaintiffs for £77 8s. 3d., with interest, on the ground that the jury ought to have been told the contract was not a sale by sample, but for specific goods for which the property had passed to the defendants, and that on the finding of the jury, all questions relating to fraud or carelessness, had been negatived. The contract was in writing, and nothing was said as to sample. *Meyer v. Everth*, 4 Camp., 22. The

jury found there was a sale by sample, and that the goods were not according to sample. There was an innocent breach of warranty. *Drummond v. Van Ingen*, 12 Ap.Ca., 284; *Benjamin on Sale*, 895-6; as to rescission, see *Arkwright v. Newbold*, 17 Ch.D., 320.

The rule was granted returnable next Full Court.

Griffith, Q.C., and *Lilley*, moved the rule absolute; *Real* and *Byrnes*, for the defendants, to shew cause.

Real: The defendants are entitled to judgment on the findings that the contract was induced by a material misrepresentation made by the plaintiffs, who were innocent at the time, but who knew the representations were incorrect before the action was brought. The plaintiffs' contention was, that in order to set aside the contract, the findings must be such as would found an action of deceit; but the defendants contend that, since the introduction of *The Judicature Act*, the rules of equity apply, and it is sufficient to entitle them to rescind the contract, to shew there was a statement false in fact on a material point made for the purpose of inducing the other party to enter into the contract. The cases cited were before *The Judicature Act*, and were founded on the common law principle, as regarded warranty. In *Kennedy v. Panama Mail Company*, L.R., 2 Q.B., 580, it was held that, if the contract was induced by a false representation, and there was a warranty, the contract could be rescinded; if it was induced by an honest misrepresentation, the purchaser would be bound to complete. Here the representations were untrue, and the contract therefore was vitiated. The principle of the Court of Chancery is founded on *Newbigging v. Adam*, 34 Ch.D., 582; and *Redgrave v. Hurd*, 20 Ch.D., 12. *Benjamin on Sale*, 426-7; *Pollock on Tort*, 287; *Smith's Leading Cases*, 190; *Palmer v. Johnson*, 13 Q.B.D., 351, were also cited.

Griffith, Q.C., in reply: This is an utterly new doctrine, and if the passing of *The Judicature Act* has brought it into existence, all the books on sales and contracts will have to be re-written.

The doctrine is only supported by *dicta*. *Redgrave v. Hurd*, does not apply. This is an executed contract for the sale of specific goods, in which the property had passed before the discovery. The contract was in writing, and perfectly innocent. The goods belonged to the defendants, the money to the plaintiffs. The misrepresentation was only of a collateral character, and on that ground, an executed contract could not be rescinded. Bowen, L.J., differed from *Redgrave v. Hurd*, in *Smith v. Land and House Property Corporation*, 28 Ch.D., 16. *Drummond v. Van Ingen*, 12 Ap.Ca., 284; *Benjamin on Sale*, 895-6, were also cited. There is no authority for the contention set up, and the rule should be made absolute.

C.A.V.

THE CHIEF JUSTICE delivered the judgment of the Court as follows:—

This is an action for the price of goods sold, of which the defendants refused to take delivery, and elected to rescind the contract. The trial took place at the last Civil Sittings, before Mr. Justice Harding and a jury, and the following questions and answers were recorded, with others not material now to be considered. Question 8: Was the subject matter of the contract, a parcel of chaff then lately landed from the "Wakatipu," described as 792 bags, weighing so and so, at so and so per ton? Answer: Yes. Question 9: Before the sale to the defendants, did plaintiffs for the purpose of inducing defendants to purchase, exhibit a sample and represent to the defendants that the whole of the chaff was of a like kind and quality? Answer: Yes. Question 9a: Was the whole of the chaff of a like kind and quality? Answer: No. Question 9b: Was it substantially, &c.? Answer: No. Question 10: Were the defendants induced to agree for the purchase under belief of the said representations? Answer: Yes. Question 19: By the course of trade of merchants in Brisbane, was the chaff to be at the risk of plaintiffs until delivery? Answer: Yes. Question 20: Was it the usual course to so deliver between plaintiffs

and defendants? Answer: Yes. Question 31: Did plaintiffs at the time they showed the sample, know it to be not substantially of the like kind and quality with the parcel? Answer: No. Question 32: Were the plaintiffs culpably ignorant, *i.e.*, reckless or careless, whether it was so or not? Answer: No. Question 33: Had plaintiffs the knowledge inquired after in question 31, before action brought? Answer: Yes. The judge gave judgment for the defendants. We are asked now by the plaintiffs, to set aside that judgment, and enter one for them for £77 8s. 3d., which is a balance after deducting the difference between the agreed price and the market value, and a sum for short delivery. The defendants insist on their right to rescind the contract, and to retain the judgment entered for them. The money amounts were provisionally assessed dependent on the plaintiffs' right, if any, to maintain their action for them. It is important in the first place to determine precisely the effect of the answers of the jury. They mean clearly, that the parcel tendered was substantially different from the thing the plaintiffs and defendants supposed they had agreed to sell and buy. It is true that chaff, a specific lot of chaff, was sold and bought,—so timber may be bought and sold—but if the sellers represent it even innocently to be mahogany, and when they tender delivery it is found to be pine, there is such a substantial difference of *kind*, that although timber is tendered, the contract cannot be enforced. There is in the case supposed, a difference both in *kind and quality*, as the jury have found in this instance with regard to the chaff. The answers of the jury give no ground for an action of deceit at common law, but I think, using the words of Lord Blackburn in *Kennedy v. The Panama Mail Company*, L.R., 2 Q.B., 580-587, "they show that there is a complete difference in substance between what was supposed to be, and what was taken, so as to constitute a complete failure of consideration." Although there was no ground for an action for deceit by the defendants against the plaintiffs, who innocently made the representation, which

was *false in fact*, as to kind and quality; yet the findings of the jury would in my judgment, entitle the defendants to rescind the contract at common law, on the failure of consideration. Since *The Judicature Act*, however, the Courts are not hemmed in by the narrow lines of the old common law decisions. If the doctrines of common law and equity in any case are in conflict, the equitable rule prevails; or if equity provides a remedy, and the common law none, or if the rule in equity is wider, or the relief more complete, then judgment must be given on equitable principles. Now let us suppose I am in error in holding that there was a failure of consideration, then, as there was also an absence of deceit or fraud, the defendants would not be entitled to rescind. In such case, the findings of the jury must be taken to mean that the plaintiffs innocently made a material representation, which was false in fact, to the defendants respecting the subject matter of the contract, and that the defendants were induced by that false representation to make the bargain. Still upon this restricted verdict, irrespective of the common law, and upon purely equitable doctrine, it would seem that the defendants ought to be entitled to rescind the contract and hold the judgment. Lord Cairns lays down the equitable rule in these words: "if persons take upon themselves to make assertions, as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue;" *Reese River Silver Mining Co. v. Smith*, 4 H.L., L.R., 79, and in the later case of *Bedgrave v. Hurd*, 20 Ch.D., L.R., p. 12, Sir Geo. Jessel, M.R., states the rule more at length. To all these doctrines and decisions, counsel for the plaintiffs reply that in this case the contract being for the sale of a specific chattel, was executed; the property had passed to the defendants, and there is no instance of rescission after that occurs; that the defendants must pay subject to a compensating deduction of price if there was a warranty; if not, they must pay the whole price. The rejoinder is then, there never can have been

rescission where a specific article has been sold, because, as the property passes from the seller to the buyer, and the contract becomes executed immediately on the sale, no subsequent discovery could revert it or remit the parties to their former condition of non-contractors. The truth is, this defence of a contract executed on the instant, is a merely legal conception which may be modified by contract. Both at law and in equity, no doubt a contract may be so far executed that the parties cannot be placed in their original position, and under such circumstances, equity at least has and applies compensating adjustments. But how can it be said that the property passed in an article which was neither wholly nor substantially of the kind and quality bargained for, which was not the thing bought and sold. If timber of mahogany were sold, would the property in timber of pine pass to the defendants? As there are different kinds of timber, so there are different kinds of chaff, and the property only passes in what was actually sold and bought. Nor must we overlook the answers to questions 19 and 12, which are in effect, I think, that by the usage of trade in Brisbane, the property and risk are with the plaintiffs until actual delivery. In this case, I however think the representation was a condition going to the root of the contract, and not a warranty; and that the article tendered being different in kind and quality, the property had not even at law, passed to the defendants indefeasibly, so that they were incapable of returning it to the plaintiffs; *Mandel v. Steel*, 8 M.&W., per Parke, B., 858. There are no circumstances requiring a modification of the rule in equity, its application is inevitable, the right of rescission is clear, the judgment for defendants must stand, and the rule must be discharged with costs.

Solicitors for plaintiffs: *Hart & Flower*.

Solicitors for defendants: *Wilson, Wilson & Brown*.

IN CHAMBERS.

REAL, J.

8th July, 1891.

*Re A. J. BARKER, IN LIQUIDATION.**Insolvency—Proof of debt—Secured creditor—**Mortgage—Joint and several covenant.*

H. sold to a syndicate of six (of which he himself was one), certain lands mortgaged to him by way of transfer and charge. The six jointly and severally covenanted to pay the mortgage debt. One of them, A. J. Barker, went into liquidation. The mortgage debt, originally £8,000, had been reduced to £7,740 9s. 5d., and as one-sixth of this was merely nominal, each of the five was liable for £6,450 7s. 10d.

H. died, and his wife and A. Raff, transferees of the mortgage, proved for that amount in Barker's estate, but the trustee rejected the proof, on the ground that they were fully secured.

Held, that the proof must be admitted.

In re Plummer, 1 Ph. 56, followed.

APPEAL from the decision of the trustee rejecting a proof in liquidation proceedings. The facts are stated in the head note.

Byrnes, S.G., for Anna Louisa Hobbs and Alexander Raff, the transferees of the mortgage, in support of the appeal, cited *In re Plummer*, 1 Ph. 56; *Ex parte English and American Bank, L.R.*, 4 Ch., 49. There was a joint and several covenant to pay the mortgage debt.

Power, for the trustee, *contra*. The appellants are fully secured.

REAL, J.: Decision of trustee reversed with costs. Appeal allowed. Proof to be admitted. Costs allowed out of estate.

Solicitors for appellants: *Hart & Flower*.

Solicitor for trustee: *G. V. Hellicar*.

IN INSOLVENCY.

LILLEY, C.J.

15th July, 1891.

In the matter of EDWARD YULE LOWRY, AN INSOLVENT.

Insolvency—Last examination—Jurisdiction—Northern Supreme Court—Insolvency Act of 1874, (38 Vic., No. 5) ss. 4, 164, 182, Rule 166.

Where an insolvent who had been adjudicated in Brisbane, was resident at Townsville, a judge of the Northern

Supreme Court has jurisdiction to hear the last examination of the insolvent, but the papers should be returned afterwards to the Supreme Court office at Brisbane. An application to fix the examination before the P.M. at Charters Towers, was refused.

An application was made to His Honor The Chief Justice, on the 20th of May last, that the above-named insolvent, who was a resident of Townsville, and who had been adjudicated insolvent on his own petition by His Honor on the 27th of November, 1889, should attend before the Chamber Judge sitting at Townsville, on Wednesday, the 10th of June last, to pass his last examination.

His Honor made the order as applied for.

On the matter coming before His Honor Mr. Justice Cooper at Townsville, who was the Chamber Judge on the date mentioned, he decided that he had no jurisdiction, nor had the Northern Court jurisdiction to conduct the last examination of an insolvent adjudicated in Brisbane, and further that the order of The Chief Justice directing the holding of such examination could not confer such jurisdiction, and declined to proceed with the same.

The town agents for the solicitors for the insolvent again appeared before His Honor The Chief Justice upon note of motion, and applied that the previous order made by His Honor be extended to Thursday, the 6th day of August, and that the examination of the insolvent should be fixed to be held on that date before the police-magistrate at Charters Towers.

On hearing the town agents, His Honor stated that his order of 20th May last was perfectly correct, and that, as to jurisdiction, there must have been some misapprehension on the part of the judge of the Northern Court. His Honor referred to sec. 4 of *The Insolvency Act of 1874*, and to the definition of "Examining Court," and stated that, for the purpose of this last examination, the Northern Supreme Court was upon his order an Examining Court within the meaning of the Statute. His Honor also referred to sec. 182, which showed that the evidence, when so taken before an Examining

Court, was to be forwarded to the Court *having jurisdiction in the insolvency*. His Honor also referred to sec. 164, and No. 166 of the General Rules in Insolvency, and said he saw no reason why the insolvent in this case should be compelled to go to Charters Towers or come to Brisbane to pass his last examination, and thereupon made the following order: Let the application for the extension of my order made on the 20th of May last, and for the attendance of the insolvent before the police-magistrate at Charters Towers, be dismissed, and let the insolvent attend before a judge of the Supreme Court at Townsville to pass his last examination, at such time as the judge shall appoint under the Statute, all necessary advertisements to be inserted after the time is so fixed; and let the necessary notice to the Trustee also be given; and let the memorandum of such last examination, duly sworn to, and the evidence taken (if any), be transmitted to the Supreme Court at Brisbane.

Solicitors for the insolvent: *Roberts & Roberts*, agents for *Roberts & Lew*, Townsville.

IN CHAMBERS.

HARDING, J. 29th July, 1891.

WALTERS v. ELDRIDGE AND OTHERS.

Practice—Parties—O. XVI, rr. 13, 15, 16—O. XXVIII, r. 7—Trustees and Incapacitated Persons Act (31 Vic., No. 19) s. 87.

In Order XVI, rr. 15-16, the words "unless otherwise ordered" do not apply to dispensing with service on added defendants. Section 87 of *The Trustees and Incapacitated Persons Act of 1867* does not apply before the hearing.

SUMMONS to add parties.

In this action, on demurrer before the Full Court, an adjournment was granted as the Court was of opinion that other parties should be added.

Charles Baldwin and John Smith were trustees under an instrument of nomination, dated the

28rd April, 1874, which was partly the subject matter of this action; and Robert Ogilvie was the surviving trustee named in and appointed by a certain instrument of nomination of trustees, dated the 11th November, 1865, and partly the subject matter of this action.

Pain for the plaintiff, applied that C. Baldwin, J. Smith, and R. Ogilvie, be added as defendants in the action, and to dispense with further service on Smith and Ogilvie, whose whereabouts were unknown. Order XVI, rr. 13, 15, 16; and section 87 of *The Trustees and Incapacitated Persons Act*, were referred to.

Macpherson for the defendants, did not oppose.

HARDING, J.: Order accordingly for adding the defendants only. Section 87 does not apply before the hearing. O. XVI, rr. 15-16, "unless otherwise ordered" do not apply to dispensing with service on added defendants.

Pain then applied to make the necessary amendments, notwithstanding the fact that a demurrer was pending under O. XXVIII, r. 7.

HARDING, J.: Order accordingly. Question of costs of demurrer reserved for the Full Court.

Solicitors for the plaintiff: *Wilson, Newman-Wilson & Hemming*.

Solicitors for the defendants: *Macpherson, Mishin & Feez*.

HARDING, J. 29th July, 1891.

In the LAND AND GOODS OF JOHN LEES, DECEASED.

Practice—Change of solicitor.

An order for change of solicitor is made as of course.

Bernays for administratrix, applied for leave to change the solicitor in the administrative proceedings, and referred to *Reg. Gen.*, May 26th, 1863, (Harding, A.&O., 562), and Order III, r. 3, (Harding, A.&O., 562).

HARDING, J., was of opinion that this should be done by the Registrar as an order of course.

Solicitors for administratrix: *Bernays & Osborne*.

AUGUST SITTINGS OF THE FULL COURT.

RICHARDSON v WHITE.

Contract—Sale of land—Mistake—Statute of Limitations—Pastoral Leases Act of 1869 (38 Vic., No. 10), ss. 10, 58.

R. purchased from W. in May, 1882, a run named Livia, the license for which had been issued under *The Pastoral Leases Act of 1869*. The run was supposed to be situated on the border of South Australia. In 1889, it was found that the run was outside the Queensland border, and that consequently, the Queensland Government could give no title. The plaintiff received official information of the non-existence of Livia, on 12th March, 1889.

At the trial before Harding, J., and a jury, the jury gave the plaintiff the £1,000 which he had paid for the run, and interest from the date of the payment and not from the date of the discovery of the mistake.

Harding, J., ordered judgment to be given in accordance with the findings of the jury, for £1,000, with interest from the date of payment.

By the Full Court the judgment was affirmed except as to the date from which the interest was to be computed, interest being allowed from the 12th March, 1889.

Where without fraud or concealment on the defendant's part, and without negligence or laches on the part of the plaintiff, but with entire ignorance on the part of both of them, that the subject matter of their bargain did not really exist, (as was the fact) the one sold and the other bought and paid for a supposed run called Livia, which they both moreover honestly believed did exist, and there was thus never any consideration for the plaintiff's payment of £1,000, or the defendant's receipt of it; the defendant is bound to repay the amount. *Bingham v. Bingham*, 1 Ves. Sen. 126, followed.

In cases of mistake, the Statute of Limitation runs from the date of the discovery of the mistake. *Brooksbank v. Smith*, 2 Y. & C., (Exch.) 60, followed.

ORDER nisi to set aside a judgment of Harding, J., of the 2nd April, and to enter judgment for the defendant, on the ground that, on the findings of the jury, he was entitled to judgment, and on the grounds that certain answers were against the evidence, and for misdirection and non-direction.

The action was brought to recover £1,000, the purchase-money paid for a run named Livia, which the plaintiff asserted did not exist, with interest from 26th June, 1882, or in the alternative, £1,500 damages.

Byrnes, S.G., and Fees, for the plaintiff; Lilley and Wilson, for the defendant.

The facts of the case appear fully from the judgments of the Full Court.

The jury found that in May, 1882, the plaintiff purchased from the defendant, the license for Livia for £1,000; that about the 1st July, 1882, the defendant did not know that Livia did not exist; that he first knew of its non-existence on the 12th March, 1889; that about November, 1883, Livia was surveyed, and its boundaries surveyed and gazetted; that the plaintiff did not know of this; that upon survey the license of Livia was included in a block named Alpha; that the plaintiff was not negligent in not insisting on his right; that it was not through plaintiff's negligence that he lost the benefit of the license of Livia; that the plaintiff was induced to agree and pay by defendant's representations of the existence of his power to point out Livia; that Livia did not exist; that the defendant could not point out Livia to the plaintiff; that the defendant did not make these representations knowing them to be false; that he did not do so without having good cause to believe them to be true; that he did so to induce plaintiff to agree and pay; that the plaintiff was induced by such representations to believe that Livia existed; that the plaintiff did not discover that the representations were false within six years of the purchase; that he did so on the 12th March, 1889; that by the exercise of reasonable diligence he could not have done so before; that he had not the means of so doing; that the non-existence and means of discovery were not concealed by the defendant for six years; that plaintiff has never been able to occupy Livia; that the plaintiff has never received any benefit from the payment of £1,000; that in 1885, no further agreement was entered into between the plaintiff and defendant; that the plaintiff received official information that Livia did not exist on the 12th March, 1889. Damages for £1,000 with interest at 8 per cent. per annum, from 1st June, 1882, to date, were awarded to the plaintiff.

Byrnes, S.G., moved for judgment for the plain-

tiff for the sum of £1,000 and interest at 8 per cent. from 1st June, 1882, to judgment.

Lilley moved for judgment for the defendant, on the ground that the jury had found that the plaintiff had not discovered that the representations of the defendant were untrue within six years of the time at which they were made. The plaintiff made two causes of action, one founded on failure of consideration, and the second an action of deceit. He had failed on the second altogether, as the jury negatived fraud throughout. On the first one they found that the consideration failed, therefore it failed when the contract was made in May, 1882, but the jury said the plaintiff could not discover it until the 12th March, 1889. It was immaterial whether plaintiff could discover it or not. The statute ran out, the time expired in May, 1888, and the action was not brought till February, 1890. In order to take the case out of the Statute of Limitations, the plaintiff would have to prove concealed fraud, and that was found not proven by the jury. Further, the statutory period ran out, and the remedy was barred on the 3rd February, 1890, and the writ was not issued till the 27th. The description of the boundaries of Alpha was gazetted on the 3rd November, 1883, and they included Livia, and put that station out of existence, and then giving plaintiff three months to come in and object under section 58 of *The Pastoral Leases Act*. It was clear that the law itself gave him notice that on the 3rd February, 1884, Livia was gone, and his cause of action had arisen. So that remedy was barred on the 4th February, 1890. The action was not brought until the 27th February. [HARDING, J.: Is this case not similar to that of the music hall which was leased for a particular night, and was burned down before that time, and consideration failed, as the music hall did not exist?] In this case the jury found that Livia never existed.

Byrnes, S.G.: The form of action is immaterial. The jury found everything upon which an action for rescission could be taken, as they had found misrepresentation. In actions for mistake, the time ran from the discovery of the mistake.

Brooksbank v. Smith, 2 Y.&C., (Exch.) 60; *Story's Equity Jurisprudence*, 850; *Booth v. Lord Warrington*, 4 Brown's P.C., 163; *Gibbs v. Gill*, L.R. 9, Q.B.D., 57. As the plaintiff had been found to have entered into the contract by misrepresentation which he could not discover, and that there had been no fault on his part, the action was equivalent to one for rescission. It was only when the Government finally refused to give the plaintiff the land, that his cause of action arose; until then the non-existence of Livia was undiscovered and undiscoverable. Consequently, as the cause of action did not arise until the 12th March, 1889, the plaintiff was not barred by the Statute of Limitations.

Feez followed.

Lilley in reply: This case is governed by *Bree v. Holbeck*, 2 Doug., 654. Concealment without fraud is no defence. *Armstrong v. Milburn*, 54 L.T., 723; *Wood v. Jones*, 61 L.T., 551.

HARDING, J.: In this case the jury have found answers to a number of questions; but the question raised for my decision is one of considerable difficulty, because it is impossible to find two cases in more direct conflict than those of *Brooksbank v. Smith* and *Armstrong v. Milburn*, 54 L.T., 743. They are in direct conflict with each other. In the one case, the judge decides that "a mistake is within the same rule as fraud." In the other case, we find the judges agreeing with Lord Esher "that it is clear she could have no answer to the defence of the Statute, unless fraudulent concealment on the part of the defendant were proved." Lord Justice Fry says: "There is no possible answer to the defence of the Statute without proof of fraudulent concealment, and I think there is no pretence of charging the defendant with any fraud whatever; and I also think there is no evidence of negligence." Thus we have two opinions—one a Baron of the Exchequer, and the other the President of the Court of Appeal at home—in direct opposition to each other. The cases that are put in with that of *Brooksbank and Smith* in Shelford's Real Property Statutes, last edition, p. 290, are all cases

of trusts, in which the property which escaped by means of the mistake was still ear-marked, and would on that account be liable to be valued in the Courts of Equity. Then in *Story's Jurisprudence* of last year, section A 1,521, there run the two defences of fraud and mistake together, thus: "For example, in case of fraud or mistake, it (meaning the Statute) will begin to run from the time of the discovery of such fraud or mistake, and not before." Then they are all American cases, except *The Ecclesiastical Commissioners v. The North-Eastern Railway Company*, which was a case of fraud, too, as far as I can see; and there is the case of *Trotter v. McLean*, 13 Ch. Div. There the judge, Fry, at present one of the Lords Justices, says that "when fraud or other equitable circumstances exist, undoubtedly the Statute will not apply." Yet that same judge says that "there could be no possible answer to the defence of the Statute without proof of fraudulent concealment." One decision was given in the year 1879, the other in 1886; and there he gives the advantage of an innocent misrepresentation, and allows the Statute the benefit. I suppose in most of these cases there was only the question of fraud before the judges, and only matters related to frauds were brought out. The other case cited by Mr. Lilley was a case of negligence, from 61 L.T., p. 551, and that, I think, is the case where the judge says that it was no part—after the negligence had taken place—of the solicitor's duty from day to day to repeat to his principal that he had been guilty of negligence. Now, the law being in that unsettled state, it is to a certain extent difficult to apply it to these facts. The facts, as I interpret them, are these:—The agreement was absolutely void in its inception, and always was void. The subject-matter did not exist; consequently at the time that the agreement was made, in 1882, at law a cause of action arose, and that cause of action by the Statute would be barred, unless an action were brought upon it within six years after the time it arose. In this case both parties on the evidence were mistaken as to the non-existence of the subject-matter of the

contract, and both parties were in the same position with respect to their rights; but neither of them knew that it was null. They went on, and the one that had benefited under the contract continued to represent—not falsely nor fraudulently in any way—but continued to represent the existence of the subject-matter until the 12th March, 1889. Neither party having any intention, so far as I can see, to injure the other, and neither party by the exercise of any diligence could have found out the actual state of affairs at law, really the Statute would have run; but these circumstances being pleaded, the Court of Equity would be induced to alter the rule of time from the statutory rule—that is to say, to alter the date from which the Statute runs—from the actual date when the contract arose to the day when it was first possible for either party to have taken advantage of it. Had this contract—and to a certain extent it must be said to have—been entered into by the plaintiff by reason of misrepresentation, it is voidable, but not absolutely void; and the party injured by it may elect whether he will what is called confirm the contract or disaffirm it. But in order to affirm the contract, at the time he affirms it he must have known the whole circumstances. Now it seems to me that so far as the contract being induced by misrepresentation is concerned, the plaintiff was never in a position, until March 12th, 1889, to confirm that agreement; so that, so far as the analogy from the doctrine of the election to confirm a voidable agreement goes, he would not have been in the position to do so after that date. That is the same period that is fixed for the starting of the Statute in *Brookesbank v. Smith*, and I may say I prefer the principle of the cases which go to establish the postponement of the running of the Statute. I think they are more in accordance with right and justice. Upon the whole, I prefer to enter the verdict in what appears to be in accordance with the finding of the jury. I think that probably if this case had been left to the jury, it would have been a verdict for the plaintiff; and it will now be judgment for the plaintiff for

£1,000, and interest at the rate of eight per cent. per annum from the 1st June, 1882.

At the April Full Court, an order *nisi* was granted calling on the plaintiff to shew cause why judgment should not be entered for the defendant.

At the June Full Court, *Sir S. W. Griffith, Q.C., A.G., Lilley and Wilson*, for the defendant, moved the order absolute. *Byrnes, S.G.*, and *Feez*, for the plaintiff, opposed.

Griffith, A.G., stated the facts and cited *Clare v. Lamb*, L.R., 10 C.P., 334; *Barber v. Houston*, 18 L.R., (Ir.) 475; and *Stranks v. St. John*, L.R., 2 C.P., 376.

Byrnes, S.G., shewed cause: There were two questions to be considered; (1) whether the plaintiff on the findings of the jury, was entitled to relief under any circumstances; and (2) whether he had brought his action within the time fixed by the Statute of Limitations. The jury found that the plaintiff was induced to purchase by the defendant's misrepresentations. The plaintiff was also induced to agree and pay for Livia by the representations of the existence of the run, and of the ability of the defendant to point it out. Livia was shewn not to exist, and consequently, the defendant could not point it out. There were innocent misrepresentations and mutual mistakes. The findings of the jury were sufficient to enable a Court of Equity to grant relief to the purchaser, on the grounds of mistake and misrepresentation. Equity will always give relief where property was non-existent. *Story's Equity*, 13th edition, sections 141, 142, 143, 143a, and note on page 157; *Fane v. Fane*, L.R., 20 Eq., 698; *Hitchcock v. Giddings*, 4 Price, 135; *New Zealand Loan and Mercantile Agency Co. v. Howes*, 4 Q.L.J., 73; *Bingham v. Bingham*, 1 Ves. Senr., 126. With regard to the Statute of Limitations, time runs from the date of the discovery of the mistake. *Brooksbank v. Smith*, 2 Y. & C., (Exch.) 58; *Booth v. Lord Warrington*, 4 Brown, P.C., 163. Even after *The Judicature Act*, the plaintiff was entitled to six years' grace for the commencement of his action after discovery, as it was an action that would have been

good in Equity before the passing of *The Judicature Act*. [REAL, J.: Do you observe the form of the first question put to the jury—Did the plaintiff purchase from the defendant the interest in the license for £1,000? and the answer is in the affirmative?] Yes, and my friends wanted to put in the words "if any" after interest.

Lilley: We contend that we sold you the license only, not the land at all.

Byrnes: If the land was not there the whole basis of the contract was gone.

Feez followed, and cited *The Ecclesiastical Commissioners for England v. N. E. Railway Co.*, 4 Ch.D., 845; *Trotter v. McLean*, 13 Ch.D., 574, 584, 585; *Denys v. Shuckburgh*, 4 Y. & C., (Exch.) 42. In *Clare v. Lamb*, the purchaser had the opportunity of examining the title to the land, but in this case there was nothing of the sort.

Griffith, A.G., Q.C., in reply: The license for Livia run was issued under *The Pastoral Leases Act of 1869*, and both parties were supposed to know the conditions under which these licenses were issued. The run was in an almost unexplored part of the colony, was unsurveyed, and all such licenses were liable to be altered. The Act also laid down that when disputes arose, the parties should be heard before a proper tribunal, who could settle the matter. All such incidents were subject to transfer with the license, and when the defendant transferred the license to the plaintiff, the latter was substituted for the former in all respects, and stood in exactly the same position. The owners of the adjoining station, Alpha, were estopped from denying defendant's rights as licensee of Livia, and on the transfer of that license, the plaintiff became the possessor of all defendant's rights, and it was his duty to guard them, but he did not do so. If there was a rescission of the contract, it was impossible for the defendant to be reinstated in the position he occupied before the transfer of the license, for the land had been taken from the plaintiff and given to somebody else. *Stranks v. St. John*, L.R., 2 C.P., 376. The transfer having been executed, and the defendant having carried out everything

that he contracted to do, the plaintiff had no remedy against him. There was no instance on record where a purchaser who had paid his money and obtained his bargain, had been able to get his money back. In the case of *Clare v. Lamb*, the plaintiff had paid his money for a title which had failed, and he got absolutely nothing. Lord St. Leonards, one of the greatest authorities on real property, held that, if a person was evicted by a title to which the covenant did not extend, he had no remedy, and could not recover the purchase-money either at law or equity. On the authority of *Maynard v. Moseley*, 3 Swan 651; *Allen v. Richardson*, 13 Ch.D., 524; and *Clayton v. Leech*, 41 Ch.D., 108; this was not a case of mutual mistake, but one governed by recognised rules of law. The purchaser had got what he bargained for, a title, which, whether it was good or bad, would not entitle him to any action for the recovery of the money paid. If he had any remedy at all, it was only on the contract, and the foundation of this action was the rescission of the contract. There was a mistake in the colloquial sense, but not in the way meant by the authorities, and the purchaser must take the consequences, and this was only just, because it was impossible to reinstate the parties in their original positions. This was really a case of failure of the vendor's title to the land intended to be the subject of the action. There was land in existence to which there was a title as between the Government and the defendant. There was no mistake as to the physical existence of that piece of country. The land had a physical but not a legal existence, for the jury found that the land known as Livia existed, but was included in Alpha Station. Both parties knew that they were dealing with land the exact position of which was undetermined; each party knew it had not been surveyed, and they also knew that if any dispute occurred about the boundaries, it would have to be settled by arbitration. [REAL, J.: That appears to me to be the whole question: whether both parties knew or did not know that they were dealing with an uncertainty.] All through they knew they were dealing for ninety

square miles under this statute; and they knew they were selling and buying unsurveyed land, which might be shifted ever so far; and they also knew the purchaser might get ninety or fifty, or ten miles, or perhaps none at all. There could be no doubt but that both parties knew well of the uncertainty of the titles. With regard to the question of the operation of the Statute of Limitations, even if there was a mistake or fraud, unless there was a concealment of that fraud, or a fraudulent concealment of the mistake, the statute did not apply. In *Pollock on Torts*, it is stated that when a wrongdoer fraudulently concealed a wrong, the Statute of Limitation only ran from the discovery of the fraud. There was nothing to shew the Court of Equity had ever gone beyond that principle. Even if it had, this was a common law action for money had and received, to which the statute applied. There seems to be a most extraordinary uncertainty, and a great deal of confusion not generally known, in the law; for if a man makes an express bargain that he has a good title in such a transaction, he is safe after six years; but if he makes no bargain, there is some implied doctrine to be found in the bosoms of the Chancery judges that makes him liable for ever. So an implied contract is a better bargain than if it is put into words, and the more careless a man is the better chance he has. In the answers to questions 14, 15, and 16 by the jury, if there were a discovery, it was clear that in June, 1882, plaintiff knew from his own agent there was an uncertainty, and that if the original description of Alpha run was adhered to, Livia run would be out of existence. [THE CHIEF JUSTICE: "If that is a fact it would impeach the verdict of the jury, because plaintiff must have known his position then."] Plaintiff at that time knew that Livia was between Alpha and the boundary. Then he was told Alpha would go up to the boundary, and surely that was the time when the statute would commence. There was no conflict of evidence. He was told of the uncertainty in 1882. He made inquiries long afterwards, and did not find out for certain until 1889. Those circumstances fitted into the dictum of

Baron Alderson as to when the statute should run. The jury should have been directed that the discovery was made in 1882, and they were bound to say so on the evidence. [THE CHIEF JUSTICE: "There could be nothing said or done to disturb this fact, that Alpha was to begin at the border, and that plaintiff knew it in 1882. The evidence entirely agrees upon this point."] About the small point on the amendment in the book, the judge told the jury Commissioner Ward had no authority to make such amendment. That depended on the construction of the statute. Section 10 provided that "it shall be lawful for the commissioner, or other officer duly authorised to amend descriptions." How was that to be construed? The learned judge directed the jury that Mr. Ward was not authorised to amend, but he submitted the commissioner was the only authorised person to do everything required by the Act. Plaintiff failed in his case completely. He never had a cause of action, and if there were one it could only be because it became unjust for defendant to retain the money. When did it become unjust? Surely not till plaintiff asked to get it back in 1889, and the jury had given him eight years' interest as well as the principal. If he had no right to claim the money until 1889, he could not claim interest before that date, so that at any rate the verdict for interest was manifestly unfair. On all grounds plaintiff had failed.

C.A.V.

At the August Full Court, the following judgments were delivered:—

THE CHIEF JUSTICE: This case comes before the Court on behalf of the defendant, on a rule nisi to show cause why judgment should not be entered for him on the findings of the jury, or why a new trial should not be granted, on the ground that the answers of the jury to the judge's questions 14, 15, and 16 are against the evidence and the weight of evidence, and on the further grounds of misdirection and non-direction by the judge. The pleadings show that the plaintiff claims a repayment of £1,000 purchase money, paid by him to the defendant for

the transfer of a license to occupy a pastoral run, called Livia, the allegation being that the supposed consideration for such payment had totally failed—was, in fact, non-existent at the time of making the contract and paying the purchase money. The facts elicited by the judge's questions, and by the answers of the jury, if in our opinion the findings are sustained by reasonable evidence, are as follows:—that in May, 1882, the plaintiff, for a payment of £1,000, purchased of the defendant his interest in the license to occupy Livia; that the plaintiff was induced to agree and pay by the defendant's representations of the existence of Livia, and of his power to point it out to the plaintiff; that Livia did not exist, and the defendant consequently could not point it out to the plaintiff; that the defendant made the representations to induce the plaintiff to agree and pay; that the plaintiff was induced by those representations to believe that Livia existed; that the defendant made the representations not knowing them to be false, but not without having good cause to believe them to be true; that about November, 1883, Alpha (erroneously called Livia in the finding No. 3) was surveyed for lease, and its boundaries advertised in the *Gazette* of 3rd November, 1883, according to section 58 of our *Pastoral Leases Act of 1869*; that upon survey the land described in the license for Livia was included in the run called Alpha, held, as the evidence shows, by a prior applicant, and therefore excluding Livia's possible existence for license or lease; that the plaintiff was not negligent in insisting on his rights, and that it was not in consequence of the plaintiff's neglect that he lost the benefit of the license of Livia; that the plaintiff did not discover the representations were false until 12th March, 1889; that he did then discover the non-existence of Livia, and of the defendant's license; that he could not by reasonable diligence have done so before; that the existence and means of discovery of such misrepresentations were not concealed by the defendant; that the plaintiff received official notice on the 12th March, 1889, that Livia did not exist;

and that he has never been able to occupy Livia, and has not received any benefit for the payment of £1,000. On these findings, then, the case may be shortly stated thus:—Without fraud or concealment on the defendant's part, and without negligence or laches on the part of the plaintiff, but with entire ignorance on the part of both of them that the subject matter of their bargain did not really exist (as was the fact), the one sold and the other bought and paid for a supposed run called Livia, which they both, moreover, honestly believed did exist; and there was thus never truly any consideration for the plaintiff's payment of £1,000, or the defendant's receipt of it. Is there any reason why the defendant should not now repay it? I put aside for the present the contention that under the Statute of Limitations the plaintiff's action is barred by lapse of time. It seems to me, taking the findings of the jury to be unimpeachable, that the rule of equity in *Bingham v. Bingham* (decided in 1748, and reported in 1 Ves. S., 126, and Supplement p. 79) must govern the decision in this case, and entitles the plaintiff to our judgment, unless the action is barred under the Statute, of which more by-and-bye. In *Bingham v. Bingham*, an agreement was made for the sale of an estate to the plaintiff by the defendant, who had brought an ejectment against the plaintiff in support of an alleged title thereto under a will. The suit was to have the purchase money refunded, as it appeared to have been really the plaintiff's estate. It was insisted that it was the plaintiff's own fault, to whom the title was produced, and who had time to consider it. It nevertheless was decreed for the plaintiff, with costs, and interest for the money from the time of bringing the bill, "for, (said the Master of the Rolls,) though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right." The doctrine of *Bingham v. Bingham* was approved in *Cooper v. Phibbs* (1867), L.R., 2

H.L., 149, *per* Lord Cranworth, p. 164. *Hitchcock v. Giddings* (1817), 4 Price, 135, is a case to the same effect as *Bingham v. Bingham*. In *Jones v. Olifford* (1878), L.R., 3 Ch.D., 791, *Bingham v. Bingham* is recognised as law by Hall, V.C. In *Cochrane v. Willis* also (L.R., 1 Ch., 58, 64) the authority of *Bingham v. Bingham* is recognised by Lord Justice Turner, and followed by the Court of Appeal. The defendant contends, however, that where the conveyance—in this case the transfer of the license—has been completed, and the purchase money paid, equity will not re-open the transaction and relieve the purchaser. The cases on which this contention is sought to be supported are founded on the practice of English conveyancers, which is unfortunately, I think, seldom followed by the profession in this colony, owing to usage due to our earlier circumstances, when the same solicitor necessarily acted for both parties. The course of practice in England is for the intending parties to a conveyance to be independently advised by different solicitors, to deal at arm's length, to furnish an abstract of the title, to compare it with the title deeds, to make requisitions on the title for proof of material links, &c., and generally to satisfy the purchaser as to the title of the vendor to convey. After these preliminaries, in the absence of fraud, the purchaser is deemed to have accepted the title so disclosed on his own judgment and at his own risk, and the Courts generally, if not invariably, decline to re-open such transactions and to relieve the purchaser. *Clare v. Lamb* (1874), L.R., 10 C.P., 334, *per* Grove, J., pp. 338-9. The cases in which relief has thus been refused are generally also instances of failure or defect of title, or of the quantity or quality of the estate, discovered after investigation of the title and completion of the contract by conveyance. They depend on the peculiar conditions of the English law of real property, and the difficulties and incidents of English titles, where general registration of title has never been established. The circumstances of our present case do not bring it within the range of the decisions to which I have just referred.

There was and could be no investigation of instruments of title to a non-existing run. It was not known to the licensors (the Government of the colony) that it did not exist. It was not until the final survey excluded the marked tree, and fixed the boundary of Alpha at the extreme western boundary of the colony that it became known to anyone that Livia was excluded, and could not possibly exist. There was, therefore, no acceptance of the seller's title, such as it might be, nor of any chance or risk by the purchaser. Under these circumstances, I think the plaintiff is entitled to relief, unless barred by the Statute of Limitations, with which question I now proceed to deal. There is no question of fraud in this case. I think the jury rightly found there was neither fraud nor concealment of fraud on the defendant's part, so I need not review the cases cited on that line of decision. This is a case of mistake—or, perhaps, something more, a case of impossibility—where they intended to deal with an existing license to occupy a run, when, in fact, there was no run to be occupied, and the intention of the parties could not possibly take effect; the contract was, indeed, an impossible thing. Now, the case of *Brooks-bank v. Smith* (1836), 2 Young and Collyer, 58, and other more recent cases, decide that where there is a mistake entitling a party to relief, the Statute of Limitations runs from the discovery of the mistake. I think the like rule must govern this case. Looking at the judge's notes, I think there was evidence on which the jury were justified in finding that the plaintiff did not discover the mistake, or the impossibility of giving effect to the contract, until the 12th March, 1889, which thus excludes the alleged bar of the Statute to the plaintiff's right to recover. There is no finding that the position of the parties has been so changed that it would be inequitable to grant the relief which the plaintiff claims. Unless, therefore, the ground for a new trial is tenable, the judgment must stand, except, perhaps, as to the time from which interest is to be allowed on the £1,000. The second branch of the rule *nisi* claims a new trial on the defendant's behalf, alleging the

jury's answers to questions 14, 15, and 16 to be against the evidence. The answer to 14 is that the plaintiff did not discover the mistake until the 12th March, 1889, and I agree with it. I think the plaintiff did not really discover the non-existence of Livia until he received the official notification from the Government. As to the answers to 15 and 16—that he could not by the exercise of reasonable diligence have made the discovery before the 12th March, 1889, and that he had not the means of doing so—I think there is reasonable evidence to support the verdict of the jury. There was no certainty in the Government department of the non-existence of Livia until the 12th March, 1889, and up to the 20th March, 1889, if not later, the defendant, through his solicitor, persistently asserted that Livia did exist. The plaintiff was for the time disarmed, and I do not see how, until March, 1889, he could begin his action against the defendant with reasonable evidence that there had certainly been a common mistake between him and the defendant in making a contract for the transfer of the imaginary Livia. [His Honor here referred to Exhibits 6, 8, 9, 10, 17, 18, 19, 21, 23, 24 and 25, and continued.] The *Gazette* of November, 1883, would, I think, be more likely to mislead the plaintiff than to rightly inform him on this point. It would not disclose to him that the boundary of Alpha had been found to be on the extreme western boundary of our colony and the eastern boundary of South Australia, and that Livia had been blotted out. The answer to an action by the plaintiff would undoubtedly have been, "Wait until the Government has finally determined that there is no country to satisfy the licence of Livia. You are premature. You have no cause of action. You have not yet sustained any damage. The Government may yet find Livia for you. I do not think there was either misdirection or non-direction by the judge with reference to Mr. Tully's evidence. It seems to me that there was, under the proviso to section 10 of *The Pastoral Leases Act of 1869*, a clear power in the Executive to control the exercise of the power of amendment, and to limit it within the local

district, and reserve it for headquarters. With regard to the interest to be allowed to the plaintiff on the £1,000, I think it should be given from the 12th March, 1889, and not, as in the judgment of the judge, from July, 1882. The final decision of the Government was given in 1889, and not until then the right of action accrued. If we are asked to give interest from 1882, it seems to me we must hold that the plaintiff's right of action accrued then, and as the writ was not issued until the 27th February, 1890, the statutory bar would prevent his recovery of either principal or interest. The jury have found that there was no new contract in 1885 on which interest could be claimed, there was certainly no contract of usury in 1882, and the defendant's retention of the money until 1889 was, under the circumstances, justified. There was no fraud and no deceit in making the contract, and the plaintiff can hardly claim that he was damaged until the mistake was made to appear, and the purchase money then withheld from him. For the right, and for the relief, it seems the 12th March, 1889, must be taken to be the fixed date. The judgment will be affirmed, except as to the interest, which will be computed at eight per cent. from the 12th March, 1889, and not from July, 1882. Judgment accordingly for the plaintiff, with costs.

HARDING, J.: In this action the plaintiff sued the defendant for £1,000, and interest from the 26th of June, 1882. It came on for trial at the Brisbane Sittings of this Court, holden before me in March and April last. The jury answered certain questions put to them by me, and the parties made certain admissions, which have been so frequently read already that it does not appear to be necessary to read them again. Judgment was entered for the plaintiff for £1,000, and interest at £8 per cent. per annum from the first of June, 1882. At the sittings of this Court holden on the 7th of April, 1891, Mr. Lilley moved for, on behalf of the defendant, and obtained an order calling on the plaintiff on the 5th of May to show cause before this Court why that judgment should not be set aside, and why judgment should not be

entered for the defendant, on the ground that on the findings of the jury he is entitled to judgment, or why a new trial should not be had, on the grounds (1) that the answers of the jury to questions 14, 15, and 16 are against the evidence, (2) that the judge having directed the jury that "as Mr. Tully, the Chief Commissioner of Crown Lands, did not recognize the alterations in the Normanton Lands Office books, it was not shown by the defendant that the person who made the alteration was authorized to make it," misdirected the jury, (3) non-direction. That order *nisi* came on for argument on the 9th of June last, on which day, and the 10th and 11th, the arguments of counsel on both sides were heard, and this Court reserved judgment. Taking the motion for a new trial first—Amongst other evidence before the jury to enable them to answer questions 14, 15 and 16, there was the following:—Exhibit No. 6 was the description of Livia, which the plaintiff received from the defendant in a letter from him [No. 5], dated the 14th of May, 1882. In this letter defendant said if he saw Mr. Reilly, he would also give him a copy of the descriptions. In [No. 1] a previous letter from the plaintiff to defendant, he refers to Mr. Reilly as "my Mr. Reilly," and that he is out of his reach by post or telegram. The description of Livia in No. 6 is as follows:—

Commencing at the marked tree by Mr. Crosswaite on the Buckley as the starting point of "Alpha" run, thence north about six (6) miles to the southern boundary of Nouranie South run, thence west along that boundary about fourteen (14) miles to the South Australian border, thence south seven (7) miles, thence east fourteen (14) miles, thence west one (1) mile to the point of commencement.

No. 15 is the land agent of the district, Mr. Warde's, report to the Lands Department thereon, from which it appears that the eastern boundary of Livia was a marked tree, the starting point of Alpha run, that the western boundary was the eastern boundary of the colony of South Australia—in short, that Livia lay between Alpha and the South Australian boundary, having a location fixed by the tree, and its metes and bounds described with reference thereto. On the 10th of May,

1882 [No. 7], the defendant transferred Livia to the plaintiff, the purchase money, £1,000, having been previously sent, as defendant had directed. On 22nd June, 1882, Mr. Reilly telegraphed to plaintiff [No. 8]—

Surveyor on Buckley has instructions to start Alpha block from South Australian border. This puts Livia bought from White out of existence.

On the 1st of July, 1882, the plaintiff telegraphed to the defendant [No. 9]—

I hereby give you notice that purchase money of Livia block must be refunded, as it will not exist when Alpha block is measured.

On the 25th of September, 1882, defendant telegraphed to plaintiff [No. 10]—

You are premature imagine in saying Livia block has no existence. Government will not repudiate their license. Apply for lease, and pay rent due to prevent forfeiture. I cannot move in matter, having transferred license to you. The plaintiff then instructed the Q. M. & A. Co., as his agents, to apply to the Surveyor-General. This that company did by their manager, Mr. Newton, who saw everyone in authority in the Lands Department, with a view of ascertaining if there was a Livia block. The Surveyor-General, Mr. Tully, always said he could give no answer till the boundary of the colony was determined. The defendant in his evidence stated that at the end of 1882 he knew there was a dispute about Livia. On the 4th of January, 1883, he wrote [No. 23] to the Minister for Lands—

I have the honor to ask for your favourable consideration of the following case:—In December, 1882, I applied and obtained a license for a watered run called Livia, which started from Alpha run. The original application of Alpha run started from the South Australian border, but this description was afterwards amended, and Alpha run was started from a tree marked by Mr. Shadforth on the Buckley River, about twelve miles from junction of Buckley with Herbert River. This amended description of Alpha run was entered in the books at the Lands Office, Normanton, and signed by Crown Lands Commissioner Warde. Should Alpha run start from South Australian border, it will throw Livia run out; I therefore have the honor to request that you will give instructions to have Alpha run started from marked tree on Buckley River, twelve miles above junction of Buckley with Georgina River. I have the honor to enclose amended description of Alpha run, copied from books in Lands Office, Normanton. The amended description enclosed is in the following words:—

Amended description of Alpha run, as entered in the books at Lands Office, Normanton. The starting point of this run is a marked tree on the Buckley River by Mr. Shadforth, about twelve miles from junction of Buckley with Herbert River.

(Signed)

A. WARDE,

C. C. Lands.

It will be seen that this differs from that in the Normanton Lands Office book by the omission of the first word, namely, *Note*. On the 26th of April, 1883, the Department wrote to him [No. 23] that—

Until the . . . boundary of the colony is determined, and the country surveyed, I cannot bind myself to adopt his views. I have already given a decision in the case of the Alpha runs, and, until they are adjusted, it will be impossible to say whether there is any country for Livia.

T. A. T.

In the *Gazette* of the 3rd of November, 1883 [No. 24], there appeared the amended description of Alpha after survey, as follows:—

Commencing at a point two miles west of a tree on the right bank of the Georgina River, marked broad arrow over J over CCL, and bounded thence on the west by a north line five miles twenty-eight chains, thence on the north by an east line ten miles, thence on the east by a south line, crossing the Buckley River at a point about twenty-four chains above a coolibar tree marked broad arrow over E over CXI in triangle, in all ten miles, thence on the south by a west line ten miles, and thence again on the west by a north line four miles fifty-two chains to the point of commencement.

There is no reference here to the South Australian boundary, and consequently nothing to give the plaintiff notice that the South Australian boundary was the boundary of Alpha. The plaintiff stated that he saw the defendant in Sydney about February or March, 1885, that the defendant assured him the country was there in answer to the plaintiff's application for a refund of the money. The defendant stated that plaintiff could not say it was not there until he got a notification. This interview the defendant denies. On the 21st of May, 1885, the plaintiff wrote to the defendant [No. 13]—

It is now a considerable time since I gave you notice that I held you responsible for the money paid by me to you for your rights in the Livia block—viz. £1,000. It has cost me much trouble, and some expense, in trying to get the Surveyor-General to place this block. He says it must stand over until the boundary line is settled, which should be shortly finished; but when finished he maintains

that Alpha block shall start from the boundary, which would shut Livia out—in fact it would not exist. This is a certainty, according to his decision; and, pending final and conclusive notice from him that Livia does not exist, I have again to give you notice that I shall expect the refund of the money paid by me to you for Livia—viz. £1,000, together with bank interest thereon from the date of payment to you. I have paid up the rent every year, so that it can be through no fault of mine if the run does not exist. The rent will of course be refunded to me by the Queensland Government. It would be well you should make your arrangements for the immediate payment of this money (when official notice of the non-location of Livia is received by me), together with interest thereon, as I have been kept out of it so long for your use and benefit. I intend to take summary proceedings for its recovery, if not paid up when called for, and you must not blame me in the matter.

On the 2nd of April, 1886, the plaintiff wrote to defendant [No. 11]—

Re Livia block. I have wired to you on one occasion, and written on another, requesting some offer of settlement re the purchase money paid you for the Livia block, and have received no reply. The block does not exist, by the authority of the Surveyor-General of Queensland. Before proceeding to extremities, and taking out a writ to recover the amount (£1,000) paid you, and interest thereon, I should like you to let me know if you are taking any steps to refund the amount, as, in the event of my having to take action to recover it, the costs of such will be against you. Be good enough to let me hear from you in the matter.

On the 7th of July, 1886, Mr. Newton wrote to the Lands Department [No. 17]—

Burke District. An application for a lease of the block named in the margin has been made, but not granted, *Livia.* as some doubt has existed as to there being available country. We have now the honor to request that you will inform us if there is any certainty that the country does not exist, and if so that you will instruct the Treasury to refund to our client, Mr. T. L. Richardson, all moneys paid on account of the same.

and received a reply [No. 18], dated 30th August, 1886—

Burke District. With reference to your letter, dated 7th ultimo, requesting that application for lease for the run called as per margin be approved, if sufficient available country exists, I have the honor to state that no action can be taken until Mr. Licensed Surveyor Bedford's plans of survey and field notes reach this office, showing the connections between Boulia and the South Australian boundary, which will furnish the Department with more particulars as to the existence of vacant country.

On or about the 12th of March, 1889 [No. 20], Messrs. Newton & Co., the plaintiff's then agents, were advised by the Lands Department—

that as there did not appear to be any country for Livia, a refund would be recommended of moneys paid thereon. This advice appears to have been sent consequent on a memorandum in the Department of Public Lands, made on the 21st of February, 1889, as follows [No. 19]:—

Burke District. The country applied for as the run called as *Application* per margin, described as being west of the Alpha *No. 916.* run, which by survey is found to be within the *Livia.* colony of South Australia. Consequently there are no grounds upon which the application can be entertained.

On March 20th, 1889, the defendant's solicitor thus writes to the plaintiff's solicitor [No. 25]—

Livia block. I have seen my client, who thinks that your proposed interview between him and your client at this stage would not serve any purpose. I am in communication with my Brisbane agent for a confirmation of the statement contained in the letter from the Lands Department, Queensland, to Newton & Co., of which you permitted me to have a copy, and to learn if it is true that Livia has not been located, the reason thereof, and if such omission is in any way due to the laches of your client, as I am distinctly given to understand that the land described in the original applications for Livia still exists.

On 17th April, 1889, the Department of Public Lands wrote to plaintiff [No. 12]—

Burke District. I have the honor to inform you that the Government have approved of the refundment *Livia.* to you of the sum of ninety-three pounds fifteen shillings, being five years' rent to 30th June, 1889, paid on account of the run applied for as per margin, as upon survey it is found there is no country to satisfy the application, the land being situated within the colony of South Australia. On your applying to the Treasury at Brisbane, the above-mentioned amount will be handed to you.

There is other verbal and documentary evidence, which goes to support and weaken the case as above stated, but this only raises a conflict on the question, and raises, consequently, a question as to the credibility of the evidence—a question peculiarly the province of the jury. To grant a new trial, this Court must be of opinion that the verdict was not only unsatisfactory, but that it was unreasonable—that it was unjust—that it was one which the jury could not properly have found. *Casper v. Nelson*, Full Court, 18th February, 1891. The case as above stated shows no discovery by the plaintiff before the 12th of March, 1889, and that the defendant's representations were false, which is the jury's answer to No. 14. At the most it can only be said to have raised a case for

further inquiry, and suppose he had prosecuted further inquiry, how would he have gone about it? Naturally he would have gone to the authority to which his vendor notified his transfer to him [No. 7], The Chief Commissioner of Crown Lands, and to whom, by section 52 of the Act of 1869, application for transfer is to be made. Had he gone there, and had the file relating to Livia been shown to him, he would have found Nos. 15 and 23—No. 15 bearing on its face a description of Livia, in accordance with its description [No. 6] sent him by the defendant, and on its back a letter from the Commissioner of Crown Lands, Burke, to the Department of Public Lands, Brisbane, which in its 2nd, 3rd, and 6th paragraphs stated—

2. That it is not either under lease or license or application for license of previous date; nor has any part of the land been selected under the 16th clause of *The Crown Lands Alienation Act of 1868* (31 Vict., No. 46).

3. That the boundaries and area are in accordance with the provisions of *The Pastoral Leases Act of 1869* (33 Vict., No. 10), and the regulations established thereunder, and do not require amendment.

6. That in all other respects this application is objectionable.

No. 23 has already been read. He might and probably would have found other documents, showing that the Chief Commissioner declined to say that Livia did not exist. Under these circumstances, it does not appear that the jury were manifestly wrong in their answers to questions Nos. 15 and 16. Consequently the order *nisi* for a new trial fails on the first ground.

On the second ground: It seems unnecessary to consider the direction, as it appears that no amendment was ever actually made in accordance with the Act, a mere note in the margin of the Commissioner's book [No. 22], not signed in accordance with section 17 of the Act, being clearly insufficient for that purpose. The order *nisi* therefore also fails on this point. The third ground for a new trial was non-direction. The nature of the non-direction is not stated in the rule, as asked for at the trial. It was that the judge should have directed the jury (1) that Mr. Warde being the Commissioner, and being the person who made the alteration in the book, it was

made by a person duly authorized, (2) that the tree marked became the starting point of Alpha, without any reference to the South Australian boundary. These grounds fail on the above ruling on the second ground. The question really was whether the description ever was amended, and this being answered in the negative, as it was in effect by the jury, all else falls with the amendment, as also does the point taken that the plaintiff should have had the matter referred to arbitration under the power in the Act. As there was no amendment, there was nothing to arbitrate on. The order *nisi* for a new trial having failed, there remains for consideration the motion to enter the judgment for the defendant on the findings, which depends on the question whether, on the findings of the jury, the plaintiff is entitled to any relief. If he is, the judgment must stand for such relief as he is entitled to. It was suggested during the course of the argument that the sale was of the chance which the license gave the defendant. Were this so, an *obiter dicta* of the M.R. in *Baxendale v. Seale*, 19 Bea. 601, at 608, might be urged as governing the case. He said—

If the result of the evidence be that the sale and purchase was a sale and purchase of an uncertain thing, I am of opinion that such a contract is good, and that neither party can resist the completion of it because the reality has turned out to be different from what was anticipated.

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which, if worth nothing, he must still take and pay for, and which, if worth much more than the purchase money, he was still entitled to have conveyed to him, without any additional money being paid for it.

In the result the M.R. found that such was not the contract, and the suit, which was for specific performance, was on other grounds dismissed. On this point the case cited by Lord Thurlow in *Mortimer v. Capper*, 1 Bro. C.C., at page 157, and also at 6 Ves., 24, and the proposition for which it is cited at section 150 of Story's Equity, and Dart's V. & P., 685, 4th edition, have been consulted by me. On the admissions and findings of the jury alone, there appears to have been no such sale of a chance—something or nothing. By

admission [1] defendant was the holder of a license for Livia. Question 2—they found that plaintiff did not know that Livia did not exist in 1882, but that he first knew it in 1889. As a fact the Government license always existed, but the land to satisfy it was the question in dispute; if not, the findings are absurd. Again, the fifth finding, that upon survey the land in license for Livia was included in Alpha, shows they had the land in view. Findings 7, 8, and 9 cannot refer to the license only. In the [8] license—on the paper—Livia did exist. The answers to 7 and 9 would be meaningless, and the opposite to the fact, if it were otherwise. Going outside the actual findings, something more than the license is often referred to. For example—in No. 1 we have "Buckley River country;" No. 5, "Block Livia," "Run Livia;" No. 6, description of Livia by metes and bounds; No. 7, "Run on Crown Lands;" No. 10, "Livia block;" No. 7 and its plan. So all through the evidence references to the country to satisfy the license are to be found. Again, if it was a sale of a chance only, the defendant need not have characterized the plaintiff's application for a refund as premature. He would have had no claim on him. And lastly, the whole conduct of the case, and the summing up of the judge, had reference to Livia as country, not a mere chance thereof. It was also contended that this is only an action on an implied covenant for title. *Stranks v. St. John*, L.R., 2 C.P., 376 (1867) was cited to show that—

by agreeing to let a lessor impliedly promises he has a good title to let,

and that the circumstances of the colony are such that such an implied promise is precluded on the part of the Government, and that, treating this as such an action, it will not lie. Assuming this for the sake of argument, then it is a case of defect in the title, so complete as to pass nothing from the defendant to the plaintiff, in which case it was said in *Bickford v. Page*, 2 Mass., 455, 461, cited in Mayne on Damages, 2nd edition, 143—

The rule for assessing damages arising from this breach is very clear. No land passing by the defendant's deed

to the plaintiff, he has lost no land by the breach of the contract—he has lost only the consideration he paid for it. This he is entitled to recover back, with interest to the time.

At page 143 Mayne says—

When the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the above is clearly the measure of damage.

Clare v. Lamb, L.R. 10 C.P., 334, was also urged to show that the plaintiff must have recourse to his remedy on the covenant for title (if any). Again, it was urged that the plaintiff was evicted by title paramount, that he might have discovered the defect of title, and was not entitled to compensation after taking it. *Maynard v. Oswald Moseley*, 3 Swans, 651, 2 Freeman, 1; *Clayton v. Leech*, 41 Ch.D., 103. Mark the words of Lindley, L.J., at page 107—

There is no doubt here that the vendors made a mistake, and that misled the plaintiff; but, unless he can show that an action for damages will lie on the ground of that mistake, he cannot succeed. The covenants in the lease give him no remedy.

Allen v. Richardson, 13 Ch.D., 524, also cited on this point, has been dissented from in *Palmer v. Johnson*, 13 Q.B.D., 351. If there was an implied promise in the present case, it was suggested that it was broken as soon as made, and that that was more than six years ago. That might be so, were the case governed by the Statute of Limitations, and did it run from the date of the contract, and not from the discovery of the failure of consideration. The plaintiff is said to have been guilty of laches. It was contended that he could, by the exercise of reasonable diligence, have got knowledge of the real fact when he was put upon inquiry. On this point Story was cited in section 146. He says that—

if by such reasonable diligence he could have obtained knowledge of the fact, this Court will not relieve him, since that would be to encourage culpable negligence.

But I find Fry, J., in *Willmet v. Barber*, 15 Ch.D., 96, at page 106, saying that in his judgment—

when the plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge.

and in the quite recent case of *Barrow v. Isaacs* &

Son (1891), 1 Q.B., 417, Lord Esher, at page 420, says—

I should, notwithstanding the negligence, if there was a mistake, have relieved immediately. It is remarkable that no definition of mistake can be found in the cases.

The question of the plaintiff's laches has already been dealt with on the new trial point, and need not be further referred to. With regard to the jurisdiction of this Court to rectify or set aside a contract on the ground of mistake—if the mistake is a mistake of fact, then as a general rule it may be said that all acts done or contracts made under a mistake or ignorance of a material fact are voidable and relievable. No studied suppression or concealment of the facts by the one party amounting to fraud is necessary to support the jurisdiction; it is sufficient if there is innocent ignorance and mistake on both sides. If authority is needed, it will be found in the case of *Cooper v. Phibbs*, L.R., 2 H. of L., 149, where it was held that—

the agreement having been made in mutual mistake, the plaintiff, though there was no fraud, was entitled to have it set aside.

Lord Cranworth, in his judgment at page 164, says—

I believe that the doctrine there [in *Bingham v. Bingham*] acted upon was perfectly correct doctrine; but even if it had not been, that will not at all show that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the mis-information given to him by his uncle, who is now represented by the respondents. It is stated by him in his cause petition, which is verified, and to which there is no contradiction, and in all probability it seems to be the truth, that his uncle told him, not intending to misrepresent anything, but being in fact in error, that he was entitled to this fishery as his own fee simple property; and the appellant, his nephew, after his death, acting on the belief of the truth of what his uncle had so told him, entered into the agreement in question. It appears to me, therefore, that it is impossible to say that he is not entitled to the relief which he asks, namely, to have the agreement delivered up and the rent repaid.

Lord Westbury, at page 170, says—

Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

It is noteworthy that in this case the mistake had

happened more than thirty years before the relief. Were it necessary in this case also, I find that the plaintiff was led into the mistake by the mis-information given to him by the defendant, the defendant not intending to misrepresent anything, but being in fact in error. Consider answers to questions 7, 8, 9, 10, 11, 12 and 13. Familiar examples of the exercise of the jurisdiction are—
(1) The example cited by Story (vol. 1, sec. 141), thus—

A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to both parties, that B has no title (as if there be a nearer heir than B, who was supposed to be dead, but is in fact living). In such a case equity would relieve the purchaser, and rescind the contract.

(2) The example cited by Story (vol. 1, sec. 142)—

If one person should sell a message to another, which was at the time swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, a Court of Equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of the obligation of their contract.

Hitchcock v. Giddings, 4 Price, 135, is cited by Story for the above proposition, and for a further example given in sec. 143—

(3) If a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an estate tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a Court of Equity would relieve the purchaser, in regard to the contract, purely upon the ground of mistake.

In *Bingham v. Bingham*, 1 Ves., 126 (1748), the purchase money paid by the purchaser for an estate he supposed he had purchased from the defendant, the estate in fact being his own, was refunded. The marginal note is—

Mistake. Equity relieves against bargains made under a misconception of rights.

In *ex parte Bignold v. Kent, re Charles*, 2 Madd., 470 (1817), a sum paid by mistake by an assignee of one bankruptcy to assignees under another bankruptcy, and divided amongst the creditors by the latter, was directed to be paid out of future effects. In *Hitchcock v. Giddings*, 4 Price, 135

(1817), already mentioned, Chief Baron Richards, at page 140, says—

If a person sell any estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase money, that is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here.

In *Livesey v. Livesey*, 3 Russ., 287 (1827), an executor who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments. *Strickland v. Turner*, 7 Ex., 208 (1852), was a case where it was held that, as at the time of the purchase the subject matter had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase money, on the ground that it had been paid without consideration. In *Cochrane v. Willis*, L.R., 1 Ch. App. (1865), it was held that the agreement was founded on a mistake, and was without consideration, and the Court refused to enforce it. The case of *Bingham v. Bingham* was recognised as bearing strongly on the case. *Fane v. Fane*, L.R., 20 Eq., 698 (1875), cited by the Solicitor-General, was a case of family settlement, which it was held would not be supported if founded on a mistake of either party to which the other party was accessory, although such mistake may have been innocently made. From *Jones v. Olifford*, 3 Ch.D., 779 (1876), it appears that the Court will, even in the case of a completed contract, give relief against a common mistake without fraud. Hall, V.C., reviewed the earlier cases as follows (pages 790, 791, 792)—

The case of *Bingham v. Bingham*, which was referred to on behalf of the defendant, carries the matter further, unless the decision there depended upon fraud, as to which I shall say more. That case is an authority to the effect that, under circumstances like the present, even if the contract had been completed and the purchase money paid, the purchaser might come to the Court, and saying "I have paid for what was my own," compel the vendor to refund the money. That case is good law, and has not been questioned; and I may refer to the observations upon it which have been made in several editions of Sugden's "Vendors and Purchasers." In the tenth edition the case will be found referred to, with a long statement taken from the Registrar's book, and it would seem that the case had not been considered as one of fraud. There was, it is true, misrepresentation on the

part of the defendant as to the state of the title, to the effect that a will devising the estate to the plaintiff was invalid, the defendant insisting that the testator had no power to make such devise, but that, if he had, the plaintiff should have been better advised before he parted with his money. But there was no fraud, and nothing beyond this misstatement of the legal effect of an instrument. The case is referred to as an authority for the general proposition contended for by the defendant, and though in some editions Lord St. Leonards has thrown out doubts whether it would apply in the absence of the element of fraud, in the last edition he definitely stated the case as an authority for the proposition, under circumstances in which "no fraud appeared;" and the case has been recognised as an authority applicable to cases where there has been no fraud. In *Saunders v. Lord Annesley*, referred to by Lord St. Leonards on the same page, Lord Redesdale expressed a doubt whether equity would interfere in a similar case in the absence of fraud. He says: "In a case of fraud it certainly might; in a case of mere ignorance, although I incline to think it might, yet, after looking a little into the subject, I find great difficulty in holding that a Court of Equity could interfere." But more recently, in *Cochrane v. Willis*, the Master of the Rolls in the Court below, and Lord Justice Turner in the Court of Appeal, treated *Bingham v. Bingham* as an authority in a case of mistake as distinguished from one of fraud. *Bingham v. Bingham* was decided by Fortescue, M.R., sitting for Lord Hardwicke. I may also refer upon this point to what was said by two learned judges—Lords Cranworth and Westbury—in *Cooper v. Phibbs*. Lord Cranworth says: "The consequence was that the present appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was in truth his own property, for in truth this fishery was bound by the covenant, and belonged to him just as much as did the lands of Ballysadare; therefore he says: 'I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.' In support of that proposition, he relied upon a case which was decided in the time of Lord Hardwicke—not by Lord Hardwicke himself, but by the then Master of the Rolls—*Bingham v. Bingham*, where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine; but even if it had not been, that will not at all show that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents." Nothing can be clearer than this, that Lord Cranworth recognised the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud. And Lord Westbury says: "It is said, *ignorantia juris haud excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of

ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.”

Citing the American authority of *Allen v. Hammond*, 11 Peters, 71, Story (sections 143A, 143B) lays it down that—

it will make no difference in the application of the principle that the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, for if the contingency has, unknown to the parties, already happened, the contract will be void, as founded upon a mutual mistake of a matter constituting the basis of the contract.

On the question of lapse of time, *Cholmondeley v. Clinton*, 2 Mer., 171—361, is an authority for the proposition that there can be no acquiescence in acts which the party is ignorant that at the time he has any right to dispute. Then see further *Cholmondeley v. Clinton*, 2 J. & W., 1 (1820), at page 139. In conclusion on this point comes the case in the House of Lords of *Earl Beauchamp v. Winn*, L.R., 6 H. of L., 223. The marginal note runs thus—

Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief. The Court of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition. What is the nature of a mistake, and what has been the cause of it, will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case, it is not decisively a ground for refusing relief. Acquiescence in what has been done will not be a bar to relief, where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

Lord Chelmsford, in his judgment, thus states the law (pages 230, 232, 233, 234 and 235)—

The ground for this application to the power of a Court

of Equity is that a common mistake has been made by these parties as to their respective rights and interests in the properties, or some of them, so agreed to be exchanged. The questions raised by it are, first, whether in point of fact there was any common mistake between the parties as to their rights and interests in the subjects respectively exchanged, and second, whether, if such common mistake existed, the appellant is not precluded from asking to have the agreement set aside, either on the ground that the late Earl knew, or had the means of knowing, all the circumstances connected with the title to the exchanged properties, or on account of there having been such dealings with the properties since the agreement as prevent the parties being reinstated in their original position. The mistake, therefore, upon which the appellant founds his equity is one which has existed (if at all) for more than sixty years, which has governed the dealings with the property during the whole of that long period, and which was at last almost accidentally discovered after that agreement had been entered into which, on account of the alleged mistake, is sought to be set aside. I asked whether there was any case in which, error having been honestly entertained for many years, equity had refused to interfere, solely on the ground of length of time. In his answer to this question, the learned counsel for the respondent introduced the element of “means of knowledge” during the time, which makes it a totally different proposition. But this objection to the appellant’s claim to relief, founded on the length of time during which the mistake which would entitle him to it has subsisted, appears to me to be wholly inadmissible. The question is, whether the late Earl entered into the agreement for exchange under a mistake as to his rights and interests. Supposing it to be proved that the Earl laboured under this mistake, what answer can it be to his claim to be relieved from the consequences of it, that his predecessors acted for sixty years under the influence of a similar mistake? The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party. Cases were cited on the part of the respondent to show that where a party is put upon inquiry, and by reasonable diligence he might have obtained knowledge of a fact of which he remained in ignorance, equity would not relieve him, since that would be to encourage culpable negligence. I cannot think that, taking all the circumstances into consideration, there was such wilful ignorance or culpable neglect as would have deprived the late Earl of his right to relief, if he was entitled to it upon other grounds. It was further argued for the respondent that the appellant was barred from relief by acquiescence, which might, it was said, be implied from length of time. The same assumption must be made, in considering this objection, as upon all that has been already said, that the late Earl was under a mistake, and ignorant of his rights. Now there can be no doubt that acquiescence, to operate as an equitable estoppel, must be with knowledge that the party ac-

quiescing has a right which would be available against that which he has permitted to be enjoyed.

Had the case then been a case for relief, notwithstanding the lapse of sixty years from the occurrence of the mistake, relief would have been granted. The present case, shortly stated, is as follows:—In May, 1882, the plaintiff purchased Livia from the defendant for £1,000 [Answer 1], and on the 10th of May the defendant transferred his interest therein to the plaintiff [Admission 3], the plaintiff being induced to make such agreement and payment by the defendant's representation that Livia existed, and that he could point it out to the plaintiff [Answer 7], whereas Livia did not exist [Answer 8], and the defendant could not point it out to the plaintiff [Answer 9]. The defendant did not make these representations knowing them to be false [Answer 10], nor did he make them without believing, and having good cause to believe them to be true [Answer 11]; but he made them to induce the plaintiff to agree and pay, and it was by such representations that the plaintiff was induced to believe that Livia existed. In short, both parties believed the subject matter of the contract, Livia, to exist, whereas it did not—a clear case of mistake. On the question of wilful ignorance or culpable neglect, the findings on the 15th and 16th questions are conclusive in the plaintiff's favour. So far, then, the plaintiff should succeed; but it has been said that the Statute of Limitations is a bar to the plaintiff's case. The Statute of Frauds and Limitations of 1867 (31 Vict., No. 22) consolidates the law of the limitation of actions—the previous enactment of 21 Jac. 1, c. 16, sec. 8, being now found in its 16th section, which is as follows:—

All actions of trespass *quare clausum fugit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account and upon the case, all actions of debt, grounded upon any lending or contract without specialty, all actions for debt, for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, the said actions upon the case (other than for slander), and the said actions for account, and the said actions for

trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fugit*, within six years next after the cause of such actions or suits, and not after; and the said actions of trespass, assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suits, and not after; and the said actions upon the case for words within two years next after the words spoken, and not after.

It was contended on behalf of the plaintiff, in the words of Story (Eq., sec. 1,521A), that—
in cases of fraud or mistake, the Statute will begin to run from the time of the discovery of such fraud or mistake, and not before.

The marginal note to *Brooksbank v. Smith*, 2 Y. & C., Exch., 58, and 6 L.J., Ex. in Equity, 34 (1836), runs thus—

In cases of mistake, the time of limitation, which by analogy to that prescribed by the 21 Jac. 1, c. 16, is held to bar the remedy in Courts of Equity, begins to run from the time of the discovery of the mistake.

At page 60, Alderson, B., in his judgment, states—

I am satisfied that it was a mistake of fact. . . . Then is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The Statute does not absolutely bind Courts of Equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the Statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this Courts of Equity differ from Courts of Law, which are absolutely bound by the words of the Statute. Mistake is, I think, within the same rule as fraud.

Booth v. The Earl of Warrington, 4 Bro. P. C., 163 (1714), was a case of fraud concealed. Alderson, B., in *Denys v. Schuckburgh*, 4 Y. & C., Exch., p. 53 (1840), thus states his view—

The plaintiff contends that he has established that this receipt has been by mistake of fact, and that this is on the same footing as fraud, and prevents the operation, if made out, of the Statute of Limitations, which in equity is adopted as a guide, but is not at law binding on the Court. I agree in that conclusion, if the circumstances of the case warrant it. But here, it seems to me that the plaintiff had the means, with proper diligence, of removing the misapprehension of fact under which I think he did labour. He had in his power the deed on which the question turns; and although it is perhaps rather obscurely worded, still I think he has allowed too much time to elapse not to be fairly considered as guilty of some negligence; and a Court of Equity, unless the mistake be clear, and the party be without blame or neglect in not having discovered it earlier, ought, in the exercise of a sound discretion, to adopt the rule given by the statute law as its guide.

The case of *The Ecclesiastical Commissioners v. N. E. Railway Co.*, 4 Ch.D., 845 (1877), was a case of breaking bounds and damage to an adjoining mine, where it was held that the Statute only commenced to run from the time of the discovery of the wrongful act, there being no laches attributable to the plaintiff for not having discovered the damage earlier. Malins, V. C., thus states the law (page 859)—

Now we all know that before the 3 and 4 Will. 4, c. 27, the Statute of Limitations was not binding in Courts of Equity; but, as Lord Redesdale expresses it in *Hovenden v. Lord Annesley*, where there is no fraud or any particular circumstances, Courts of Equity act not merely by analogy, but in obedience to the Statute. Therefore, where there is no fraud, that which would be binding in a Court of Law would be also binding in a Court of Equity, and consequently twenty years was a bar to claims in equity, because that period would be a bar at law; but, in a passage from Lord Redesdale's judgment in *Bond v. Hopkins*, 1 Sch. & Lef., 429, he says, "Nothing is better established in Courts of Equity . . . than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscionably obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by Courts of Equity as affected by the Statute of Limitations—that is, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon to prevent the bar created by the Statute, the Court, acting by analogy to the Statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him, if his title were solely at law, he shall be barred in equity." But equity will remove the legal bar proceeding from lapse of time, as it would any other legal advantage if sought to be used unconscionably. That is all the relation this Statute has or ought to have on proceedings in equity.

Trotter v. McLean, 13 Ch.D., 574 (1879), was another case of trespass to a mine. Fry, J., at page 584, thus proceeds—

The next question which arises is with regard to the Statute of Limitations. The defendant's workings began in November, 1871, and the six years before the issue of the writ began on the 20th April, 1872. The question of the Statute, therefore, applies only to the interval between November, 1871, and April, 1872. The Statute 21 James 1, c. 16, sec. 3, imposes the term of six years as the limitation in actions of trespass; and, although the present proceeding is a proceeding in a court of conscience, it is undoubtedly in respect of a trespass, and it appears to me that the period of limitation imposed by the Statute of James ought to apply to proceedings in this Court in respect of a trespass, unless there be some equitable

ground for repelling the application of the Statute. Such an equitable ground has in many cases been found in fraud. When fraud or any other equitable circumstance exists, undoubtedly the Statute will not apply.

Gibbs v. Guild, 9 Q.B.D., 59 (1882), a case of concealed fraud and absence of reasonable means of discovery, was cited for the dictum of Brett, L. J., at page 72—

It seems to me that we are bound by authority, which shows not that the Court of Equity construes the Statute of Limitations in any way different from the Court of Common Law, nor that the Court of Equity will not apply the Statute of Limitations when the cause of action has accrued more than six years, but that the Court of Equity in a case like the present would have given the remedy which the plaintiff seeks, and, applying their own equitable doctrine, would have prevented this particular defendant from defeating the plaintiff's claim by means of the Statute of Limitations. That doctrine seems also to have been recognised in *The South Sea Company v. Wymondsell*, 3 P. W., 143. It is true that the present case might be treated as a common law action, but it is also one which might have been treated before the Judicature Acts as a suit in equity. Under these circumstances, it seems to me that, merely because it is brought in the Common Law Division, we have no right to say it is not a suit in equity; and, if it be a suit in equity, then we are bound by the authorities to which I have referred to hold that the plaintiff is not deprived of his remedy by reason of the plea of the Statute of Limitations, because the reply sets up an equity to which effect would be given by a Court of Equity.

Barber v. Houston, 18 Ir. L. R., 475 (1885), was another case of concealed fraud, and an attempt to show absence of reasonable means of discovery. It recognised *Gibbs v. Guild*, and distinguished it. *Armstrong v. Milburn*, 54 L.T., 723 (1886), was an action for negligence, and it was endeavoured to answer the defence of the Statute of Limitations by proving concealment of the negligence till within six years before action brought. The observations of the Lords Justices were entirely unnecessary for the decision of the case, and applied only to the necessity for fraudulent concealment as an answer to the Statute. *Wood v. Jones*, 61 L.T., 551 (1889), is of a similar character—an action for negligence not discovered. In the present case, the action was brought within six years of the plaintiff's discovery of the mistake, and consequently the judgment must be affirmed, except that interest only is allowed from the 12th March, 1889. Plaintiff to have costs.

Solicitors for plaintiff: *Daly & Schacht*.

Solicitors for defendant: *Bernays & Osborne*.

In the matter of JAMES LORIMER BANNATYNE.

Barrister—New Zealand Admission.

A barrister of the Supreme Court of New Zealand, who was also a barrister of Cape Colony, had elected to be admitted there under his Cape Colony qualification.

On his production here of a certificate, under the seal of the Supreme Court of New Zealand, that he had in every way qualified under their rules to be admitted there as a barrister, he was allowed to be examined in the statute law of Queensland, so far as it differs from that of England.

Re Bannatyne, 3 Q.L.J., 58, 74, 75, considered and affected.

PETITION, by way of appeal from the decision of the Board of Examiners for Barristers, refusing to give him a certificate of fitness for admission, to be admitted as a barrister, or in the alternative to be examined in the statute law of Queensland, so far as it differed from that of England.

From the affidavit of the petitioner, it appeared that he had been admitted as a barrister of Cape Colony, which entitled him to admission in New Zealand. He had also qualified according to the New Zealand rules, and had passed all the examinations required there. In order to keep his precedence, and to avoid payment of the larger fee, Mr. Bannatyne had elected to be admitted under the Cape Colony qualification. A certificate, under the seal of the New Zealand Supreme Court, that the petitioner had qualified in all things necessary under the New Zealand rules, was produced.

Power, for the petitioner, stated the above facts, and submitted that the Court was not informed of all the circumstances on the previous applications. Mr. Bannatyne had passed a general examination, besides the limited examination in New Zealand law as stated in the judgment of Lilley, C.J., 3 Q.L.J., 75. In New Zealand there was an additional examination for a barrister, which was a distinct status. The petitioner had two qualifications, but had elected to be admitted on the Cape Colony certificate.

Lilley and Shand, for the Board, stated that there had been two previous judgments of the Full Court against the petitioner; that the Board did not oppose the application, but wished the circumstances to be laid before the Court. The fact remained that the admission in New Zealand was on the Cape Colony qualification. In New Zealand there was one profession with two degrees, such as a B.A. and M.A. If the petitioner was admitted, would it be as a solicitor or barrister?

Power, in reply: Petitioner had two strings to his bow; but elected, though otherwise fully qualified, to be admitted on his Cape Colony certificate. He is entitled to be admitted here as a barrister, under the rules of reciprocity with New Zealand.

The Chief Justice delivered the judgment of the Court.

LILLEY, C.J.: In this case Mr. Bannatyne has made repeated application to the Court for leave, I think, to be examined. He now applies for leave to be examined by our Law Examiners, or in the alternative to be admitted. We, of course, would not admit him without examination, because we should then hold that he has the full status of a New Zealand barrister, where they admit our candidates after they have passed in the local law. Therefore the same condition with regard to reciprocity must be applied to him here. Therefore it is only the first part of the prayer of the petition that we could take into our consideration. As I said on the outset, Mr. Bannatyne has made repeated applications; but it certainly does not appear upon any one occasion that the Court was fully informed, or was at all informed of the circumstances now put before us. The Court manifestly was under the impression that he (Mr. Bannatyne) was a barrister from the Cape of Good Hope, who, to secure admission here, there being no reciprocity between the Courts of the Cape of Good Hope and this Court, had gone to New Zealand, and was permitted by a sort of side door to get a New Zealand certificate, as his is a Cape qualification, which would not be

recognised here, and had endeavoured to get in upon our roll as a barrister. We considered that to be an evasion, or an attempt to evade the rules of this Court. We have said in this case, and in another case, we will not permit any evasion of our rules; and if we are satisfied that such an attempt has been made, we would reject the applicant. It appears, however, from the new matter before us, that there is considerable probability that there was no thought of evasion whatever. It seems now, not only from the certificate of the Examiners, but what is of more importance, from the certificate of the judges—that is, of the Court itself—that Mr. Bannatyne was admitted under these circumstances: Being undoubtedly a barrister of the Cape of Good Hope, he went to New Zealand, and applied for admission there; but, instead of using substantially his mere Cape qualification, he submits himself to full examination, just as if he had been originally stationed in New Zealand. He had relaxation of the rules as to general education, which seems to be reasonable, and with which we have nothing to do; and he also passes in an examination under section 4 and section 6 of *The New Zealand Practitioners Act*; so that, when he went into the Court of New Zealand to ask for his admission as a barrister, he was fully qualified to have gone in for admission as a fully qualified student entitled to admission in New Zealand. It appears that there was before his eyes the temptation of fifteen guineas, which he could save by using only the Cape of Good Hope status. He could have been, and would have been, admitted by the New Zealand Court upon his full qualification, but not upon his Cape qualification; and they have certified to us that he had passed all the examinations, had complied in every respect with what was required of a student in New Zealand for admission to the bar, and had been given a general certificate that he was admitted as a barrister of the Supreme Court of New Zealand. We have nothing to do with the collection of fees for New Zealand, and if they practically choose to make a remission of fifteen guineas in his favour

—though I don't think he was prudent even to effect such a saving, to run the hazard of being refused admission here—that is their business. We are not collectors for New Zealand; but if he likes to send fifteen guineas as conscience money to New Zealand, we will make no objection. As we think him fully qualified for admission, we may grant the first part of the prayer; but it must be known to all that we will in no way depart from the principles on which we decided his case originally. We will not permit any evasion of our rules, for the purpose of letting in persons whose original qualification is defective, and who have no better qualification than their original defective qualification. If a Cape of Good Hope barrister goes to New Zealand, and gets through, and gets a certificate as barrister of New Zealand, we will not admit him, and we will not admit anyone who comes here under these circumstances with only the certificate of the Examiners. Here the certificate of the New Zealand Court entitles him to the status of a barrister of the Supreme Court of New Zealand. Therefore, under the circumstances, we will not look too harshly into the matter, but will let him be examined by our Examiners in the subjects prescribed by our rules.

Order accordingly.

HARDING and REAL, JJ., concurred.

IN CHAMBERS.

LILLEY, C.J.

10th August, 1891.

*In the matter of JOHN CLARENCE PRITCHARD, AN
INSOLVENT.*

*Insolvency Act of 1874 (38 Vict., No. 5), s. 88—
Damages for personal injuries—Asset in
estate.*

A sum of money, recovered by an insolvent for personal injuries, not ordered to be paid over to the trustee. It is in the discretion of the Court whether such an order should be made under sec. 88 of *The Insolvency Act of 1874*.

APPLICATION for a rule *nisi* on the above-named insolvent, to show cause why the whole or part of the sum of £251, now in Court to the credit of an action, *Pritchard v. Howard Smith & Sons*, should not be paid to the trustee.

On May 9th, 1891, the above-named John Clarence Pritchard brought an action in the Southern District Court, claiming £1,000 damages for injuries sustained whilst working for Messrs. Howard Smith & Sons on board the s.s. "Kouoowarra," and, after hearing, judgment was given for the plaintiff in the sum of £251. Shortly before the hearing, the plaintiff filed his petition in insolvency *in forma pauperis*, and the Official Trustee was appointed trustee of his estate. It was now sought on behalf of the trustee, under sec. 88 of *The Insolvency Act of 1874*, to attach this amount, which would be the only asset in the estate.

Chambers, for the Official Trustee, applied to attach the money in Court, and referred to sec. 88 of *The Insolvency Act of 1874*. The section is mandatory.

LILLEY, C.J., declined to make the order, holding that sec. 88 was discretionary, and that this was a case in which it should be exercised, as the amount consisted of damages for personal injuries. *Ex parte Vine*, 8 Ch.D., 364, followed.

Solicitors for the Official Trustee: *Chambers, Bruce & McNab*.

LILLEY, C.J. 10th August, 1891.

Re THE LANDS AND GOODS OF GEORGE TRIMBLE,
INTESTATE.

Intestacy—Administratrix—Leave to mortgage—Intestacy Act of 1877 (41 Vict., No. 24), s. 50.

Leave to mortgage given to the curator and administratrix of an intestate.

PETITION by G. H. Newman, Curator of Intestate Estates, and Frances Maud Madeline Trimble, widow.

The Curator applied for leave to mortgage certain real estate, for which Letters of Administration had been granted to him and the widow of the intestate jointly, and referred to sec. 50 of *The Intestacy Act*.

LILLEY, C.J., after referring to *Williams on Executors*, 5th ed., 840, *Mead v. Orrery*, 3 Atk., 239, and *Russell v. Plaiice*, 18 Beav., 21, approved of the exercise of the power of mortgage by the petitioners, for the purpose of managing and carrying on the station.

HARDING, J.

24th August, 1891.

UNION BANK OF AUSTRALIA, LIMITED v. THORPE.
Practice—Costs of substituted service—O. III, r. 7a.

Costs of substituted service were allowed in addition to the fixed costs of nine guineas.

Forrest (Daly & Schacht) applied for costs of substituted service, in addition to the costs allowed by Order III, r. 7a, and cited a similar case, *Wright, Heaton & Co. v. Anderson*, cor. Harding, J., on 20th September, 1889.

HARDING, J., allowed the costs, fixed at eight guineas, in addition to the nine guineas fixed costs.

Solicitors for plaintiffs: *Daly & Schacht*.

SAME v. SAME.

Practice—Garnishee Order—Notice by telegram O. XLIV, r. 3.

Notice to garnishees by telegram allowed to bind the debts in their hands.

Forrest (Daly & Schacht), for plaintiffs, judgment creditors, applied for a garnishee order *nisi*, against Hodges & Chataway, of Mackay, on a judgment and costs, all unpaid, and that notice to the garnishees by telegram should bind the debt in their hands, by Order XLIV, r. 3.

HARDING, J.: Order accordingly.

Solicitors for plaintiffs: *Daly and Schacht*.

HARDING, J.

24th August, 1891.

*Re E. D. WELLER, IN LIQUIDATION.**Liquidation—Registration of resolutions—Insolvency Act of 1874, rule 218.*

The resolutions passed by the necessary majority allowed to be filed, although the time for filing had elapsed, and the resolutions had been signed by certain creditors who were not present, but were represented to be so.

C. B. Lilley, for the liquidating debtor, applied for leave to register the resolutions of creditors, passed at an adjourned meeting on the 12th August, and read affidavits embodying the facts mentioned in the order.

HARDING, J.: It appearing that the necessary majority have passed the resolutions, and that the resolutions are in form as to such majority, let the persons to whom they have been entrusted be at liberty to file them, notwithstanding that the time for doing so has elapsed; and, if tendered by them for filing, let them be filed, notwithstanding that they are signed by certain creditors as being present, when they were not present as represented.

Solicitors for debtor: *Lilley & O'Sullivan.*

NORTHERN SUPREME COURT, TOWNSVILLE.

IN INSOLVENCY.

In the matter of EDWARD YULE LOWRY, AN
INSOLVENT.

CHUBB, J.

July 27th and August 17th.

Insolvency—Last examination—Jurisdiction—Northern Supreme Court—Form of order—Insolvency Act of 1874, (38 Vic., No. 5.) ss. 4, 164, 165, rr. 1, 2.

Order of The Chief Justice, reported *ante* p. 78, not given effect to, as being mandatory in form. *Semble*, if it had been in the form of a request, it would have been complied with.

G. A. Roberts, for the insolvent, applied on 27th July, to His Honor to appoint a day for the insolvent to attend and pass his last examination,

pursuant to an order of The Chief Justice, made on 15th July last—reported *ante* p. 78.

C.A.V.

On 17th August, the following written judgment was delivered by

CHUBB, J.: In this matter, Mr. Roberts, solicitor for the insolvent, has applied to me, upon the authority of an order of the Court, made at Brisbane, by The Chief Justice, on 15th July last, to appoint a day for the insolvent to attend before me to pass his last examination. The matter has already been before Mr. Justice Cooper, upon a previous order made by The Chief Justice on 20th May last, with the trustee's consent, directing "that the last examination of the insolvent be fixed to take place before the judge sitting in Townsville in Chambers, on Wednesday, the 10th June, 1891." My brother Cooper declined to act upon that order, being of opinion, with great respect to the opinions of the learned Chief Justice, that he had no power to make it, and suggested that the necessity of the attendance of the insolvent at Brisbane might be obviated by an order directing the insolvent to pass the examination before the Police Magistrate at Charters Towers, under the 165th section of the Act. An application was accordingly made to The Chief Justice to this effect, which the learned judge dismissed, and, without apparently rescinding the order of 20th May, made the order upon which application is now made to me. The order, made also with the trustee's consent, runs as follows:—"It is ordered that the insolvent attend before a judge of the Supreme Court at Townsville, to pass his last examination, at such time as the judge shall appoint under the Statute, &c." I need not read the rest of it, but it is all equally peremptory. I am not satisfied that the learned Chief Justice had power to make such an order. It is, I presume, made under section 164 of the Act, which says that "the Court shall appoint some day for the insolvent to attend in Court to pass his last examination." The practice hitherto under this section (as I have understood it) has been that the same judge who appoints the day, also takes the

examination, unless the examination has been directed to be held before a police magistrate, under section 165, or unless by arrangement; or in case of absence of the judge, some other judge has, in accordance with the rules, seen fit to act. The Registrar here informs me that he has no recollection of any order like the present ever having been made when the Northern Court was at Bowen, and I do not remember any similar order. By the general rules in insolvency of 5th September, 1876, (1 & 2) all proceedings are in the first instance to be marked with the name of a judge, and all subsequent proceedings and hearings requiring the presence of the judge, are to be had and taken before the judge so named, unless otherwise ordered, and unless for any of the special causes mentioned in the rules, any other judge may see fit to act upon any application made to him therein. The learned Chief Justice is reported in this case—*ante* p. 78—to have said that the Northern Court became upon his order an "Examining Court," within the meaning of the Statute. I cannot see the authority for this. The section uses the words "attend in Court," which I take to mean in the Supreme Court, (see definition of "the Court," section 4) and by force of the rules before mentioned, before the judge making the order, whose name is marked on the proceedings: (in this case the learned Chief Justice himself). The judge then sits I think, as "the Court," not as an "Examining Court." Provision is made by the rules cited for another judge, under certain circumstances, taking the examinations; but if I am not bound, as these rules plainly infer, to act in a matter assigned to another judge unless I see fit to act, I do not see where the judge has power under the Statute to order me to do so. Could the learned Chief Justice make an order in these terms (changing Townsville for Brisbane) upon one of the other judges at Brisbane? I think not; therefore I do not see how it can be made to a judge at Townsville. My objection of course, is to the form in which the order is drawn up. As I read and transpose it:—"Judge at Townsville is ordered to appoint the

day and attend in Court to take the examination." If it were in the form of giving leave to the insolvent to pass his last examination before the Northern Court, and that the Northern Court be requested to give effect to the order, I should have no hesitation in complying with it. While however, it remains in its present mandatory form, I must, with great respect, unless overruled by the Full Court, refuse to give effect to it.

Solicitors for insolvent: *G. A. Roberts & Leu.*

COOPER, J., J.O.

August 25th.

HAWKINS v. HAWKINS AND FLYNN.

Divorce—Practice—Prior marriage of respondent—Costs.

In a suit for dissolution of marriage on the ground of adultery, where the answer sets up a prior marriage of the respondent, that question must be determined before the question of adultery is gone into.

Robins v. Wolseley, 1 Lee, 616, and 2 Lee, 149, followed. Form of order as to costs where guilty wife has separate estate.

THIS was a suit for dissolution of marriage, on the ground of the wife's adultery, heard before Cooper, J.O., and a jury of four. The answer, before charging the acts of adultery charged, alleged that the respondent had been previously married to one Potter, who was alive at the time she went through the form of marriage with the petitioner.

Macnaughton appeared for the petitioner; *Ross* for the respondent; the co-respondent did not appear.

At the commencement of the case, *Macnaughton* submitted that the question of the former marriage must be determined before the question of adultery was gone into, citing *Robins v. Wolseley*, 1 Lee, 616, and 2 Lee, 149, quoted in *Browne & Powers on Divorce*, p. 59, and *Drain on Divorce*, pp. 82 and 269.

Evidence of the marriage of the petitioner and the respondent was accordingly given, and no evidence being offered by respondent to support that portion of the answer, the jury found that

the petitioner had been lawfully married to the respondent.

The issues relating to adultery were then tried and determined in favour of the petitioner. It having appeared that the wife was possessed of separate property, the following order was made as to costs:—"Decree nisi for dissolution of marriage, with costs against the co-respondent. In the event of his not being able to pay them or any part of them, then with costs against the respondent."

Solicitors for petitioner:—*E. Norris & Son.*

Solicitors for respondent: *G. A. Roberts & Leu.*

In the matter of JAMES HARPER, AN INSOLVENT.
CHUBB, J. August 31st and September 2nd.

Annulment of insolvency — Insolvency Act of 1874, (38 Vic., No. 5) s. 163.

The power of the Court to annul an insolvency, under sec. 163 of *The Insolvency Act*, is discretionary, and will only be exercised in a proper case. Where the insolvent by false swearing and to evade payment of his debts, procured himself to be adjudicated insolvent *in formâ pauperis*, when his debts were under £200, and his assets (cash in hand, which he endeavoured to conceal) exceeded £3,000; application to annul the insolvency after all creditors had been paid in full, refused.

In re Corry, 1 Q.L.J., 59, followed.

This was an application under sec. 163 of *The Insolvency Act*, for an order annulling the insolvency, the creditors having been paid in full.

The facts and arguments sufficiently appear from the judgment.

Macnaughton for the insolvent.

Brown for the trustee, did not appear.

C.A.V.

On September 2nd, the following written judgment was delivered:—

CHUBB, J.: The power of the Court to annul an insolvency is, under section 163, discretionary, and will only be exercised in a proper case. The circumstances of this case are exceptional, so much so, that in giving my decision, I think it necessary to refer to them.

The insolvent was adjudicated by me an insolvent *in formâ pauperis*. To obtain an adjudication in that form, it was necessary to swear, and the insolvent did swear, that, exclusive of wearing apparel, he was not worth five pounds in the world. In this manner the insolvent escaped payment of the Court fees; but this was not all. The trustee subsequently discovered that so far from the insolvent not being worth five pounds, he was worth £3,428 in money, which he had conveyed away to and concealed in New South Wales, in anticipation of becoming insolvent, and to avoid the payment of a call in the liquidation of the No. 1 Lady Maria Gold Mining Company, Charters Towers, which call amounted to £176 16s. 2d. The insolvent was subsequently prosecuted under the criminal sections of *The Insolvency Act*, for concealing property. He was tried before me at Charters Towers and convicted. On the grounds of his previous good character, the jury recommending him to mercy. Taking into consideration that recommendation, and the fact that the concealed money would be recovered by the trustee, and that the creditors would be paid, and a considerable portion of the assets expended in trustee's commission and law costs, I imposed the comparatively light sentence of three months' imprisonment.

It is now urged that I should annul the insolvency, because the creditors have been paid, and that the insolvent has been sufficiently punished under the circumstances, inasmuch as in addition to the imprisonment, the costs of the insolvency, commission and law costs, amounting to £258 16s. 2d., are a severe penalty. I think this is a case in which I ought not to exercise the discretionary power of the Court. The insolvent, by an abuse of the process of the Court, and by false swearing, procured himself to be adjudicated insolvent, when his debts were under £200, and his assets (cash in the bank), exceeded £3,000, and he did this to evade payment of his debts. In my opinion, if he had not been found out, the creditors would never have been paid, so that no virtue attaches to the fact that his creditors have been

satisfied. They were paid in spite of him. The law will not assist rogues, and I think that the annulment of an insolvency should only be made where the insolvent has acted as an honest man, and I quite agree with the opinion to the same effect expressed by the learned Chief Justice in *In re Corry*, 1 Q.L.J., 59; consequently, I decline to order the adjudication to be annulled. The application is dismissed, and the trustee is allowed £4 4s. for his costs, out of the estate.

Solicitors for the insolvent: *G. A. Roberts & Leu*.

Solicitors for the trustee: *Marsland & Marsland*.

MATRIMONIAL CAUSES JURISDICTION.

The Judge Ordinary. 4th September, 1891.

PECHY v. PECHY.

Judicial Separation—Permanent Alimony—Security—Injunction.

On an application for permanent alimony, security was ordered, and leave to apply for an injunction and receiver to protect the whole of the respondent's property for the benefit of the petitioner, if it appeared that the respondent was dissipating it, or putting it out of his power.

Noakes v. Noakes and Hill, 47 L.J. (P.D. & A.), 20, and *Newton v. Newton*, 55 L.J. (P.D. & A.), 14, followed.

A PETITION for judicial separation had been presented, decree granted, and a reference to the Registrar as to the amount of the respondent's income, in order to fix the amount of alimony. The following order was then made: Alimony, £220, for one year from 1st July, 1890, payable monthly in advance to petitioner; school fees and maintenance at school to be paid in addition; furniture to be in her keeping, except his books and the furniture in his own room. By consent, the respondent is to give a second mortgage over the Ruthven Street property, Toowoomba, to secure £220 a year, and the cost of the schooling and carrying out of the decree for alimony. Costs of this petition allowed petitioner, as between solicitor and client, taxation being on the footing of necessities strictly.

Rüthning, for the petitioner, applied for permanent alimony.

Order: Permanent alimony, school fees, and maintenance as per previous order, and in continuance thereof, except that there is to be an increase of £15 a year in respect of each child with the wife for one year, then £20 for each child, so long as they remain with the mother and under twenty-one years of age and unmarried, the security for this order to be continued over the Ruthven Street property. Leave to apply for an injunction and a receiver to protect the whole of the husband's property for the benefit of the petitioner under this order, if it appear that the respondent is dissipating it, or putting it out of his power. Leave to either party to apply. Costs, to be taxed as between solicitor and client, allowed to the wife. *Noakes v. Noakes and Hill*, 47 L.J. (P.D. & A.), 20; *Newton v. Newton*, 55 L.J. (P.D. & A.), 14.

Solicitors for petitioner: *Rüthning & Byrom*.

IN CHAMBERS.

HARDING, J. 28th Aug. & 9th Sept., 1891.

COHEN v. BONNEY.

Capias ad respondendum—Amendment—31 Vict., No. 4, ss. 48, 51; 38 Vict., No. 3, s. 11.

An order having been made for the issue of a writ of *ca. re.* against the defendant for £177, being the amount endorsed on the writ of summons in the action, application was made by the defendant to vary or rescind the said order, on the ground that the affidavit in support did not show that £177 was due, but £176 14s. only. Leave was given to the plaintiff to amend the writ of *capias* and other documents, by substituting £176 14s. for £177; the plaintiff to pay defendant's costs of application.

Moore v. Morgan, 16 M.&W., 95, not followed.

Plock v. Pacheco, 9 M.&W., 342, and *Cunliffe v. Mallan*, 6 Dowl & L., 723, followed.

APPLICATION by the defendant, under sec. 51 of *The O. L. Practice Act of 1867*, to vary or rescind an order of the 28th August, 1891, holding the defendant to bail for £177.

Lilley, for the defendant, applied to vary or rescind the order as above, on the ground that the

amount in respect of which the defendant had been held to bail was not due. He cited *Bashford v. Sawyer*, 3 Q.L.J., 38; *Ounice v. Rigby*, 3 M.&W., 67.

Wilson, for the plaintiff, applied for leave to amend, by substituting the sum of £176 14s. instead of £177, and cited *Burns v. Chapman*, 5 C.B. (N.S.) 481; *Plock v. Pacheco*, 9 M.&W., 342; *Laroche v. Wasbrugh*, 2 J.R., 787. *Daniel's Ch. Practice*, 6th edition, 1658.

HARDING, J.: Allow the writ of *capias* and other documents to be amended, by substituting £176 14s. for £177, and let the plaintiff pay the costs of this application, fixed at twelve guineas.

Lilley subsequently mentioned the matter, and submitted that the writ might be amended, but not the copy. *Moore v. Morgan*, 16 M.&W., 95.

Wilson cited *Ouniffe v. Maltass*, 6 Dowl & L., 728.

HIS HONOR referred to *The Supreme Court Act of 1874*, s. 11, and *Chitty's Archbold*, 10th edit., 745, and made the following order: Allow order of 28th August, 1891, the writ of *capias*, and the copies of the said order and writ, served on defendant, to be amended, by substituting £176 14s. instead of £177. If the said copies of order and writ of *capias* served on defendant be not delivered by the defendant to the party carrying out this order, for the purpose of allowing the same to be actually amended, let a fresh copy of such order and writ of *capias*, as amended, be served on defendant, and let such service be treated as actual amendment, and let the plaintiff pay the costs of this application, to be taxed.

Solicitors for the plaintiff, *O'Shea & O'Shea*.

Solicitors for the defendant, *Lilley & O'Sullivan*.

CIVIL COURT.

HARDING, J. 28rd September, 1891.

Re THE AUSTRALIAN MERCANTILE LOAN AND GUARANTEE COMPANY, LIMITED.

Practice—Petition—Affidavit of service.

An affidavit stating that a copy of a petition to wind up a company, with a copy of the fiat or order of the

Court indorsed thereon, had been served on the manager of the company, is not sufficient.

The original petition with the fiat thereon, should be produced at the time of the service of the copy, the original petition being filed after the hearing.

Re Shuttler, 3 Q.L.J., 128, followed.

PETITION to wind up a company.

Scott, for Joseph and John Gillon, creditors, supported the petition, and read an affidavit stating that a copy of the petition filed herein, had been served on the manager of the company, with a copy of the fiat directing when the petition would be heard.

HARDING, J.: This is not the correct mode of service. A petition is served "by delivering to, and leaving with the person served, a true copy of the petition and foot note thereto, and of the fiat or answer thereon, and at the same time shewing him the original petition and answer thereto," as stated in *Daniel's Chancery Practice*, 6th edition, 1565. The affidavit of service should follow the form in *Daniel's Ch.*, No. 1534; see also, *Palmer's Winding Up Forms*, No. 17.

Scott: A different practice seems to obtain here. The original petition is presented to the Registrar, the fiat indorsed, and the filing completed contemporaneously. Consequently, it is impossible to shew the original petition at the service.

The Registrar stated that the practice was to file the original petition with the fiat on it, to serve a true copy, and to make an affidavit verifying the copy served.

HARDING, J.: The practice is the same for all petitions, except those in insolvency. I drew attention to this in *re Shuttler*, 3 Q.L.J., 128. The practice is not altered by *The Judicature Act*. The practice is not to file the petition until after it has been heard. *Annual Practice*, 1882, p. 111. The correct practice is to leave the petition with the Registrar, and a copy for the use of the judge to get the fiat indorsed, then serve the petition. When the order has been made, the original petition must be filed with the Registrar before passing it. It might be better if a true copy were filed originally.

Solicitors for the petitioners: *Powers & Robinson*.

HARDING, J.

6th October, 1891.

ELLIOTT BROTHERS v. WEBB.

Husband and wife—Intestacy of wife—Jus mariti—Succession Duties Act of 1886 (50 Vict. No. 12, s. 27.)

A married woman had purchased the chattels of her husband from his trustee in liquidation proceedings. The husband and wife continued in joint possession till the wife's death, when the husband retained possession. The Curator of Intestate Estates claimed the goods as administrator of the wife who had died intestate. The plaintiffs, execution creditors, also claimed them.

Held, that the husband was entitled *jure mariti* to his wife's goods, and that administration was not necessary, that sec. 27 of *The Succession Duties Act* did not apply, and that the Curator's claim should be dismissed with costs.

INTERPLEADER SUMMONS.

The defendant, Webb, had filed a petition for the liquidation of his affairs, and his wife had purchased, with money from her separate estate, all the chattels of her husband from the trustee. The wife died, and the husband continued in possession of the said chattels. Judgment was signed and execution levied against the defendant by the plaintiffs. A dispute then arose to whom the property belonged. The Curator of Intestate Estates claimed the property as belonging to the wife who died intestate. The plaintiffs also claimed them. The Sheriff interpleaded.

The Under-Sheriff applied for an interpleader order.

Chambers, for the Curator of Intestate Estates, claimed as the administrator of the estate of Catharine Eliza Webb, the late wife of the defendant.

Fitzgerald, for plaintiffs.

At the request of both parties, the matter was dealt with in a summary way, under section 28 of *The Interdict Act of 1867*, the amount in dispute being under £50.

Chambers referred to sec. 20 of *The Mercantile Act*, and cited *Allsop v. Day*, 31 L.J., (Ex.) 105; *Woodgate v. Godfrey*, 5 Ex.D., 25; *Marsden v. Meadow*, 7 Q.B.D., 80; *Ashton v. Blackshaw*, L.R., 9 Eq., 510.

Fitzgerald: The wife is dead; judgment was

signed against her husband since her death. The Sheriff has seized. The husband is entitled *jure mariti*, without administration, to the possession and property of the goods. *Molony v. Kennedy*, 10 Sim., 254; *Re Lambert's Estate*, 39 Ch.D., 626; *Lush, Husband and Wife*, 1884 edn., 136; *Surman v. Wharton* (1891), 1 Q.B., 491. *The Succession Duties Act* does not apply. There is no evidence of any debt affecting separate estate. *Married Women's Property Act of 1890*, ss. 8 and 24.

Chambers referred to *The Succession Duties Act*, s. 27; *Smart v. Tranter*, 43 Ch.D., 587. The husband was in possession before the administration.

HARDING, J.: It appears that the husband had taken possession without taking out administration. He appears to have been right in so doing, as her chattels passed to him *jure mariti* on the cases cited. This being so, s. 27 of *The Succession Duties Act* does not apply. But he is the legal personal representative of the wife, within the meaning of section 23 of *The Married Women's Property Act of 1890*, and therefore, subject to the same liabilities as she would be subject to if living, in respect of their property. Order: Disallow the claim of the Curator with costs.

Solicitors for the Curator: *Chambers, Bruce & McNab*.

Solicitors for the plaintiff: *Macdonald Paterson, Fitzgerald & Hawthorne*.

NORTHERN SUPREME COURT, TOWNSVILLE.

FULL COURT.

MUNICIPAL COUNCIL OF TOWNSVILLE v. ROONEY AND CO.

October 2nd, 1891.

Crown Lands Alienation Act of 1890, secs. 6 & 7—Valuation and Rating Act of 1890, secs. 4 & 11—Crown lands occupied for private purposes—Lands "vested" in Corporation.

Land temporarily reserved under sec. 6 of *The Crown Lands Alienation Act of 1876*, and placed temporarily under the control of a Municipal Council, is rateable when let to tenants who occupy it for private purposes.

Per CHUBB, J. : It is Crown land used for private purposes, and is not "vested" in the Municipal Council so as to come within sec. 11 (3) of *The Valuation and Rating Act of 1890*.

SPECIAL case, stated by way of appeal from a decision of the Police Magistrate, Townsville, as to the liability of certain land to be rated, under *The Valuation and Rating Act of 1890*.

This is a case stated by me, the undersigned, Police Magistrate, of Townsville, under *The Justices Act of 1886*, for the purpose of obtaining the determination of the Court, on a question of law which arose before me as hereinafter stated.

1. At a petty sessions, holden at Townsville on the 23rd day of June, 1891, for the hearing of appeals under *The Valuation and Rating Act of 1890*, a question arose between the said Council and the said Rooney & Co., as to the liability of certain land to be rated; whereupon, after hearing evidence, I decided that the said land was not liable to be rated.

2. And whereas the said Council, desiring to appeal from my decision upon the hearing of the said question, on the grounds that it is erroneous in point of law, and in excess of jurisdiction, pursuant to sec. 226 of *The Justices Act* aforesaid, duly applied to me in writing to state and sign a case, setting forth the facts and the grounds of such my decision as aforesaid, for the determination of this Court.

3. And whereas, I, the said Police Magistrate, in compliance with the said application and the provisions of the said statutes, stated and signed a case which was called on for hearing, and the Court being dissatisfied with the statement thereof, ordered that the same be re-stated.

4. Now therefore, I, the said Police Magistrate, in obedience to the said order, do hereby re-state and sign the following case.

5. Upon the hearing of the said question, I found the following facts:—

- (1). That by Proclamation published in the *Government Gazette* (a copy whereof is hereto annexed), the land hereinbefore and hereinafter mentioned, namely, allotments 1, 2 & 3, of section C, within the Municipality of Townsville, was temporarily reserved for a wharf, and temporarily placed by the Crown under the control of the appellant Council.
- (2). That allotments 1 & 2 of the said land, were then held and occupied by the said Rooney & Co., under lease granted to them by the appellant Council.
- (3). That allotment 3 of the said land was then held and occupied by the said Rooney & Co., under lease from the Queensland National Bank, Limited, which Bank held the same under lease from the said Council.
- (4). That the rent of allotments 1 & 2, was at the rate of £1 per foot per year; and the rent of allotment 3, was 15s. per foot per year.

(5). That the lease from the appellant Council to Rooney & Co., contained a covenant that the lessees would, during the term of the lease, pay all existing and future taxes, rates, assessments, and outgoings of every description for the time being, payable either by the landlord or tenant, in respect of the said premises.

(6). That when Rooney & Co. took the said lease from the appellant Council, the said Rooney & Co. believed that they would have to pay rates which became payable in respect of the said land.

(7). That Rooney & Co. did thereafter pay both rent and rates to the appellant Council in respect of allotments 1 & 2, and rates in respect of allotment 3.

6. Mr. Leu, who appeared for Rooney & Co., contended that, by virtue of the said proclamation, the said lands were vested in, or in the occupation of the Council, and that, as the said Council was for the time being entitled to receive, and did actually receive, the rents for and in respect of the said land, they, the Council, were the owners within the meaning of the interpretation clause of the said *Valuation and Rating Act of 1890*.

7. Mr. Simpson, the valuer on behalf of the said Council, contended that, as Rooney & Co. had previously paid rates to the Council for the said land, in accordance with a covenant in their lease, they should continue to do so, and were liable to pay rates for the said land.

8. Upon the facts so found by me, I decided that the said land was not rateable.

9. Upon the ground that the said land was vested in the said Council.

10. The question for the determination of this Honorable Court is:—

Whether the said land was rateable under section 11 of the said Act, on the facts as found by me.

(Signed) J. G. MACDONALD, P.M.

PROCLAMATION.

By His Excellency Sir Arthur Hunter Palmer, Knight, Commander of the Most Distinguished Order of St. Michael and St. George, President of the Legislative Council of the Colony of Queensland, and Administrator of the Government thereof:

In pursuance of section 6 of *The Crown Lands Alienation Act of 1876*, I, Sir Arthur Hunter Palmer, the Administrator aforesaid, with the advice of the Executive Council, do, by this my proclamation, notify and proclaim that the land hereunder described, has been temporarily reserved for a wharf, and placed temporarily under the control of the Municipal Council of Townsville.

Maonaughton for the appellants: The land in question was not vested in the Corporation. Vest means to give some property in. *Overdale v. Charlton*, L.R., 4 Q.B.D., per Brett, L.J., at p. 120, and per Cotton, L.J., at p. 124; *Young v. Robertson*, 8 Jur., N.S., at p. 827; *Stroud's Judicial Dictionary*, 860; *Wharton's Law Lexicon*,

758. At any moment it might be resumed by the Government. Where the word vested is used in Acts of Parliament, it is in instances where a substantial property in the land has been given; *Trustees of Public Lands Act*, (33 Vict., No 2), preamble and sections 3 & 7; *Racing Club (Victoria) Act of 1871*. The respondents, being in occupation of the land for their own private purposes, ought to pay rates; *Ex parte Taylor*, 7 N.S.W., S.C.R., 407; *Hanna v. Seymour Road Board*, 2 W.W. & A.B., (L.) 93; *Reg. v. McLachlan*, 4 W.W. & A.B., (L.) 57; *Mayor of Essendon v. Blackwood*, L.R., 2 App. Ca., 574.

Ross for the respondents: The Council, until the proclamation is rescinded, have a conditional freehold estate in the land; and being "owners" within the meaning of sec. 4 of *The Valuation Act*, the land is vested in them, and so exempt from being rated. By rating such land, the Council do not gain anything, as they will get lower rents from their tenants.

Macnaughton was not called on to reply.

COOPER, J.: This is a case stated by the Police Magistrate of Townsville, under sec. 226 of *The Justices Act*, from which it appears that the Council of the Municipality of Townsville are the appellants, and Rooney & Co. are the respondents. The Court is asked to decide whether certain land, which has by proclamation been temporarily placed under the control of the appellants, and has been leased by them to the respondents, is rateable. By *The Valuation and Rating Act of 1890*, all land is made rateable, except what is excepted by s. 11 of that Act. In my opinion, the land in question does not come within any of these exceptions; therefore I answer the question put to me in the affirmative, and there will be judgment for the appellants with costs.

CHUBB, J.: I am of the same opinion as my learned brother. All land is rateable unless it can be shown to come within one of the exceptions mentioned in sec. 11 of *The Valuation and Rating Act of 1890*. The land in question, it appears to me, does not, by virtue of the proclamation, cease

to be Crown land; and as it is in the occupation of the respondents, and is used by them for their private purposes, it is clearly rateable—in fact it is the converse of sub-sec. 1 of sec. 11 of *The Valuation and Rating Act of 1890*. I am further of opinion that the land is not vested in the appellants, so as to come under sub-sec. 3 of sec. 11. A proclamation of this kind, only puts the Corporation in the position of bailiffs or caretakers of the land, as the Government may resume it again at any moment. It cannot therefore be said to be "vested in" (which means having a title to) the Corporation.

Solicitors for the appellants: *E. Norris & Son*.

Solicitors for the respondents: *G. A. Roberts & Lew*.

OCTOBER SITTINGS OF THE FULL COURT.

THE ROYAL BANK OF QUEENSLAND *v.* HIPWOOD
AND OTHERS.

*Practice—Final Judgment—Order XIV., r. 1a—
Appeal—Discretion of Judge.*

If an order has been made under *The Judicature Act* or rules, in which a judge has exercised a discretion, the Full Court will not interfere with such order, unless for strong and substantial reasons.

Wallingford v. Mutual Society, 5 Ap. Ca. 685, followed.

APPEAL from an order of Harding, J., giving leave to sign final judgment. The facts appear from the judgment.

Griffith, A.G., Q.C., and *Feez* for the plaintiff; *Byrnes, S.G.*, and *Lilley*, for the defendants, applied for leave to defend.

HARDING, J., delivered the following judgment: This is an appeal from an order dated the 28th August, made under Order XIV, rule 1A, giving the plaintiffs liberty to sign final judgment in this action against the defendants Hipwood, Harris, and Lock; judgment by default having already been signed against defendant Gannon. The appellants ask leave to defend. The action is brought to recover a balance due on the defendants' account with the plaintiffs, secured by their

joint and several bond and mortgages. This bond is dated the 30th of April, 1887, and is conditioned for the payment by the defendants or any or either of them to the plaintiffs of all moneys which the defendants or any or either of them may borrow from or be indebted to the plaintiffs up to £3,600, with one year's interest and costs. It contains a proviso that in case the said sureties or either of them shall give to the plaintiffs notice of their or his desire to discontinue being security for the defendants, then immediately after the said notice shall have been so given the liability of the said surety or sureties giving such notice shall cease and determine, so far as respects any debt or liability which shall be incurred or come under by the defendants to the plaintiffs after the expiration of the said notice, unless and except so far as any such future debt or liability shall arise out of any engagement or transaction at that time outstanding. On the execution of the bond the plaintiffs opened an account in the names of the defendants known as the Hawthorn account, which was operated on in the names of and by all the defendants together. Certain arrangements were made between the defendants respecting the use of their account, which was an overdraft. These arrangements, the defendants alleged, were communicated to the plaintiffs' manager, Mr. E. Griffith, both before and after the execution of the bond, and he concurred in them. The Solicitor-General contended that this operated as and was an account of credit under the provision in the bond and to the extent of such arrangement. Under the circumstances which subsequently arose it is unnecessary to decide this point, as all the amounts open to dispute fall on dates after the 12th August, 1887, the date of an authority to the defendant Gannon, to which I now come. The plaintiffs became dissatisfied as to their position, and Mr. E. Griffith had an interview with the defendants, Hipwood and Lock, which resulted in the defendant on 12th August, 1887, signing and delivering to the plaintiff a letter signed by all the defendants except Gannon in the following words:—"We hereby authorise M. B. Gannon to act generally in all

matters relating to the Hawthorn Land Company." The effect of this authority was to annul any pre-existing restriction on the operation of the bond, and to render the defendant liable thereon in respect of all the acts of the defendant Gannon, as secured thereby to the fullest extent. Thereafter the account continued to be kept with the plaintiffs by the defendant, and was operated on by the defendant Gannon; and it is in respect of matters arising in consequence of such operation that the defendants claim leave to defend. Such a claim is clearly untenable, unless something equivalent to fraud respecting them by the defendant Gannon connived at by the plaintiff is shown. Nothing of the kind is set up by the affidavits filed on behalf of the defendants. Something as to certain promissory notes amounting in all to £526 is spoken to in paragraph 25 of the affidavits of the defendants Hipwood and Lock, on information received from Mr. Gannon, and believed by the defendants. This is substantially disposed of in the affidavit sworn by Mr. Cannan, and filed by plaintiff in reply. The House of Lords has held in the case of *Wallingford v. Mutual Society* (L.R. 5, App. Cas. 695) that in a question arising on orders and rules made under *The Judicature Act* in matters where courts or Judges are to exercise a discretion, the House is unwilling to disturb the orders made unless for strong and substantial reasons, but the principle on which such orders ought to be made may furnish those reasons. Selborne, L.C., at p. 690, says, "The question being in some measure one of discretion under the 14th General Order governing the practice of the High Court, your Lordships would be very unwilling to disturb this order unless for strong and substantial reasons." I can find no such reasons existing in this case. In the result then there is no defence, and the appeal should be dismissed with costs.

The CHIEF JUSTICE and KEAL, J., concurred.

Solicitors for plaintiff: *Chambers, Bruce and McNab*.

Solicitors for defendant: *Unmack and Fox*.

THE MUNICIPALITY OF BRISBANE v. THE METROPOLITAN TRAMWAY CO., LIMITED.

The Valuation and Rating Act of 1890 (54 Vict., No. 24), sec. 13, subsecs. 1, 5—Tramways Act of 1882 (46 Vict., No. 10), sec. 82—Rateable Property—Land.

Tramways are rateable property within *The Valuation Act of 1890*.

A tramway is land for the purposes of rating, but *quaere* the basis of valuation.

SPECIAL case, stated under section 226 of *The Justices Act*, by way of appeal from the decision of A. M. Francis, Police Magistrate.

The abovenamed appellants appeared before the undersigned, a police magistrate conducting a Court of Petty Sessions for hearing appeals against valuations, in accordance with the provisions of *The Valuation and Rating Act of 1890* aforesaid, at the Town Hall, Brisbane, on the twenty-seventh day of August last past, and by their counsel, Mr. Rutledge, contended that—

- (1.) The tramway is not rateable land under the provisions of *The Valuation and Rating Act of 1890*.
- (2.) If it is, the rule for ascertaining the valuation contained in section 13, subsection 1, is inapplicable, and therefore the valuation must be fixed at £30, under the provisions of section 13, subsection 5.

In reply, Mr. Feez, on behalf of the respondents, contended—

- (1.) That the tramways are rateable under the aforesaid *Valuation and Rating Act of 1890*.
- (2.) That their value is to be estimated under the provisions of section 13, subsection 1 of the said Act.

The facts admitted on both sides were as follows, namely—

- (1.) That the appellants are the owners of certain lines of tramway within the municipality of Brisbane, constructed under *The Tramways Act of 1882*.
- (2.) Such lines of tramway are continuous throughout the municipality.
- (3.) The said lines of tramway are all laid in public streets in the said municipality.
- (4.) That the appellants were served with twelve separate notices of valuation for the said lines of tramway, each of which notices was in the form A attached hereto [Exhibit A].
- (5.) That the municipal valuer made and returned his valuation in respect of the said lines of tramway in the form B, a copy of which is hereto annexed [Exhibit B].
- (6.) That the appellants duly appealed against the said valuations.

- (7.) That on the hearing of the said appeals, it was admitted on behalf of the respondents that the only evidence adducible in support of the valuations was evidence of the fair average value of unimproved land, held by private persons in fee simple, abutting on and in the neighbourhood of the streets in which the said lines of tramway are situated, which land it was on behalf of the respondents contended, and on behalf of the appellants denied, to be of the same quality as those portions of the said streets on which the said lines of tramway are constructed.

whereupon the undersigned gave his decision, that the tramways are not rateable under *The Valuation and Rating Act of 1890*, and the appeal is upheld.

A. M. FRANCIS, P.M.

4th September, 1891.

The grounds on which the decision was made are as follows:—

- (1.) *The Valuation and Rating Act of 1890* excepts from rating all streets "as lands vested in a local authority" (sec. 2, subsec. 3), and the tramways are constructed on streets in the municipality.
- (2.) The said Act indicates the meaning of the phrase "rateable land" in sec. 13 by the schedule (2) attached [Exhibit C].
- (3.) The phrase "of the same average quality," in sec. 13, subsec. 1, excludes from comparison lands available for cultivation, for building, for excavation, and streets available for none of these purposes.
- (4.) The intention of *The Valuation and Rating Act of 1890* throughout appears to be the valuation and rating of lands of private owners. The said Act, therefore, can be taken to include tramways only by forced and unreasonable interpretations of its several sections.

A. M. FRANCIS, P.M.

4th September, 1891.

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Feez for the appellants; Rutledge and Lilley for the respondents.

Griffith, Q.C., A.G.: The respondents have appealed against the valuation of their lines to the justices, on the grounds that their occupation of the streets could not be the subject of rating, and the magistrates have upheld that view. [THE CHIEF JUSTICE: *The Tramways Act* says they shall be rated.] I will show this is a mistaken idea, and that the rating has been made on well-known principles a hundred years old. [THE CHIEF JUSTICE: They used to determine the value of the way-leave for collieries.] Under section 82 of *The Tramways Act*, it was provided "every tramway constructed or worked by a company or other

persons, under the provisions of this Act, shall be deemed to be rateable property, within the meaning of the laws in force for the time being for the government of municipalities or divisions." When that was passed, *The Local Government Act of 1878* was in force in Brisbane respecting valuations, and section 176 provided for the rating of all lands except, amongst other, land in the occupation of the Crown, or of any person or corporation, and used for public purposes, and land vested in, or in the occupation of, or held in trust for the municipality, or the council thereof. As there might be some doubts about these words, section 82 of *The Tramways Act* had expressly provided for the rating of tramways. Section 176 of *The Local Government Act* had been repealed by section 4 of *The Valuation Act of 1887*, which was substantially to the same effect. Section 7 of the latter statute laid down certain rules for the annual valuation, providing that the annual value of improved rateable land should be taken to be not less than five per cent. upon the fair capital value of the fee simple, with a proviso that this did not apply to fully improved land. By *The Valuation Act* of last year, the Act of 1887 was repealed, without making any substantial difference in the lands exempted from valuation. Section 13 dealt with the mode of making the valuation, and subsection 1 provided "except as hereinafter otherwise provided, the value of any rateable land shall be estimated at the fair average value of unimproved land of the same quality held in fee simple in the same neighbourhood." None of these provisions repealed section 82 of *The Tramways Act*. Apart from the latter, the right to run lines had always been held to be occupation from the oldest times. Even to drive posts in the river bank had been held an occupancy for rateable purposes. And land had always been rateable. An Act for the relief of the poor, 43 Elizabeth, which was the first rating Act passed, provided for the raising "weekly or otherwise, by the taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, tithes impropriate, appropriation of tithes, coal mines, or

saleable underwoods in the said parish, in such competent sum or sums of money as they shall think fit." It had further been held that the occupation of land by pipes was occupation for rating purposes. The contention of the appellants in the lower court was that subsection 1 of section 13 of *The Valuation Act* could not apply if the rateable value was under £80.

Lilley: We contend the tramway cannot be rated, because it is not valuable.

THE CHIEF JUSTICE: That is not before us. The only question for our consideration is whether it is rateable. If it is, it must go back to the lower court.

The Attorney-General: The courts in England have got over the difficulty of rating such properties, and there is now a recognised rule by which streets are rated. In the case of *The Queen v. South Staffordshire Waterworks Company*, on appeal, 16 Q.B.D., 359, it was held that, the whole of the works being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply; also that the deductions to be made in respect of the rates which the hypothetical tenant would have to pay, was the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list. Lord Esher, in his judgment (p. 367), shows how the difficulty of rating streets can be got over. "In endeavouring to rate these properties, everything is imaginary and unreal, and in making the calculations, especially with regard to great works, such as those of waterworks and railway companies, no two calculations, though made by the most skilled persons, will ever agree in the figures. Disputes consequently arose as to what was the best mode of getting at those figures, and I take it that the case of *Regina v. Overseers of Mile End Old Town*, 10 Q.B., 208, shows the acquiescence of the Court of Queen's Bench in a particular mode of arriving at the proper figure. Not that anyone

has said that such figure represents the actual rent which the hypothetical tenant would give, but that it is the nearest to it, and the mode there adopted is the most reasonable for ascertaining the proper rent." In the case Lord Esher referred to, the works of a water company extended into several parishes, and consisted of two portions, one of which, being the service pipes which delivered the water to the consumer, was directly productive of profit, and the other, consisting of reservoirs, buildings, &c., indirectly conduced to such production. In some parishes the company had no works, but service pipes. The rateable value, for the purposes of the poor rate, of the entire work was £80,800. The rateable value of the reservoirs, buildings, &c., valued as land and buildings, deriving additional value from their capacity of being applied to the objects of a water company, was £6,500. It was held that the rateable value ought to be apportioned among the several parishes in the following manner: the rateable value of the reservoir, buildings, &c., valued as above, to be first deducted from the total rateable value, and distributed amongst the parishes in which this portion of the work was situate, according to the extent of such works in each parish, and the residue of the rateable property to be apportioned among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes. This has been adopted as a leading case, and the ruling laid down in it has been followed in *The Queen v. The Proprietors of the West Middlesex Waterworks*, 28 L.J., M.C., 135. The fact of the legislature providing for the rating of tramways shows that they recognise some method of estimating the valuation. If a tramway has no approximate valuation of the same kind, then its own values would form the basis of valuation. [THE CHIEF JUSTICE: What would be the valuation in Queen Street?] Whatever the valuation of the easement might be. [THE CHIEF JUSTICE: But when there is no other easement of the same value?] That would present no greater difficulty than in the case of a hypothetical tenant. Take the case of a

very valuable mine. It cannot be said it is unrateable because there is no other mine of a similar value in the neighbourhood. The only question is, so much of the street is occupied by the Tramway Company; what is the value of such occupancy? It is not the same as a prairie land in a state of nature, but on the principle of the nature of the improvements around it. And neither is it the same thing as the right to run a tramway in the far western portion of the colony.

Rulledge: Section 176 of *The Local Government Act* provided that all land is rateable property within the meaning of the Act. Section 82 of *The Tramways Act*, superadds to this section something else rateable. Turning to the interpretation clauses of *The Tramways Act*, streets and tramways are both specially defined. Taking these two definitions in conjunction with the 82nd section I find the tramway is totally distinct from the land on which it is laid. My contention, therefore, is that a tramway is not land, but property, and property entirely distinct from the street on which it is laid. [THE CHIEF JUSTICE: So is water, and yet in some cases it is declared to be land. In this case, however, the tramway is fixed to the land.] The thing that is made rateable must be the structure and not the land. [THE CHIEF JUSTICE: But the structure can be made the land. There is a statute which distinctly provides their property shall be made rateable property. What kind of property? Why, the land. And then you have sections 11 and 18 of *The Rating Act*, which say land is rateable.] The section under which the appellants levied rates was the 82nd of *The Tramways Act*, and they were bound by what that meant. If this were land, then there would be no necessity to say tramways should be rated. [THE CHIEF JUSTICE: No; I do not see that. It might have been provided so to remove doubts. Before passing section 82 the street was a common highway. So probably with the view to say such property shall be taxed, they made it rateable. I take the section to mean this shall be the substantive object of rating.] It could not be regarded as land

except by virtue of occupation by means of the tramway. Assuming it was land, then the next question was, being nominally liable to be rated, could it actually be rated? [THE CHIEF JUSTICE: No certainly not. We do not care a fraction for that. The point you now want to raise is not the question of to-day.] The respondents' contention is that it was not capable of valuation at all, and that the appellants had adopted an artificial valuation. It is open to the respondents to question the possibility of valuating the tramways. [THE CHIEF JUSTICE: No. You can only do that by way of a later appeal.] The point was taken in the lower court that it must be valued at £80. [THE CHIEF JUSTICE: We only deal with the question whether it is rateable. However the rating can be arrived at is a matter for other people, subject of course to an appeal here. We cannot deal with the mode now.] There is no mode possible, and the land therefore cannot be valued. The valuation, according to the Act, has first to be made, and then the property rated. If it cannot be valued how can it be rated? According to the provisions of the Act of 1890, it cannot be valued because property can only be valued under certain rules. It is not rateable also because the appellants have not proceeded in the manner required by the Act, and not having valued in the manner prescribed by the Act they have not valued at all.

Lilley submitted that land had a peculiar meaning in these Acts, and not the ordinary meaning. By section 177 of *The Local Government Act of 1874* it was possible to make anything rateable property. The following sections up to 189 all referred to land as rateable property. That consisted then of land and everything on it. But a street was not rateable property, so that the land on a street was not liable to be rated. *The Tramways Act*, section 82, said in effect, section 176 of *The Local Government Act* provides that all land is rateable, and tramways now should also be rateable. That was not the soil or the right-of-way, but the material 5 feet across the street. It did not say it should be

land. [REAL, J.: How do you get over the second part of section 176 regarding fee simple?] It could not be said the fee simple of the tramway. Land therefore excluded the meaning put on it by *The Acts Shortening Act*. They did not rate an awning put over a crossing. [REAL, J.: On the goldfields they did.] That was because all the land there belonged to the Crown, and could not be rated. [HARDING, J.: Can a post to tie up a horse or a trough be taxed?] No; they could tax neither of those things. It was not a question of occupancy, but a question of ownership. Land must have a particular construction under *The Amending Valuation Act of 1887*. Section 3 of that Act provided that land should include houses, buildings, and other structures thereon. If tramways were not also meant to be included, they should have been specially excluded. The whole purport of the Act was not to tax improvements, but only ownership. The soil of the street was not rateable also. [THE CHIEF JUSTICE: Under that Act tramways must be rateable. A tramway was not a mere improvement but a substantive work.] In one way it was an improvement. [THE CHIEF JUSTICE: And in another way it is a horrid nuisance.] I can only urge *The Valuation Act* meant to tax land only. It was not intended to tax a tramway converted into land by Act of Parliament.

LILLEY, C.J.: This is an appeal from the decision of the junior police magistrate of Brisbane, Mr. Francis, delivered on or about 4th September, 1891—at least that is the date of the case submitted to us—and he has submitted the matter for our opinion, by virtue of *The Justices Act*. It appears that he gave a decision that the tramways are not rateable under *The Valuation and Rating Act of 1890*. It was an appeal to him, originally, for his decision, the tramways having been rated by the Municipal Council of Brisbane. He decided that tramways were not rateable, and now the corporation, who had caused them to be valued for the purpose of levying a rate, appeal, and they contend that

the tramways are rateable. Well, now, there is precedent in the Act for this. In *The Railways and Tramways Act of 1882*, by section 82, it is enacted that "every tramway constructed or worked by a company or other persons under the provisions of this Act shall be deemed to be rateable property within the meaning of the laws in force for the time being for the government of municipalities or divisions;" and by that the tramway itself is the thing that is to be rated. Now I need not touch any of the intermediate cases which have been referred to. I do not think that it is necessary to call them in aid of the construction of *The Valuation and Rating Act of 1890*. By that Act (section 11), it is enacted "all land is rateable for the purposes of this Act," and by section 18, "in the valuation of land, the following rules shall be observed." Now, what is the nature of the property in the tramways? It is rateable property; and in order—probably I should say absolutely in order—to be rated under this *Valuation and Rating Act*, it must be land; it must be of the nature of land. Is it of the nature of land? Are the tramways land? Well, if we look at it apart from *The Acts Shortening Act*, and look at the provisions in *The Railways and Tramways Act* itself, and bring to bear our common knowledge of the subject, we know a tramway is a solid structure upon the soil of the street. It is probably of the width of five feet, strongly built, embedded in the soil, and connected through its whole length by rails, upon which trucks are run. Being planted in the soil, it partakes of the common law nature of soil itself. It is land, although *The Railways and Tramways Act* says that the company shall have no interest in the soil. Still that does not affect the character of the thing that is planted in the soil. Although they may have no actual interest in the soil, they may have an interest in that which is planted in the soil, which may itself partake of the nature of land, and may be land. There are two properties in this tramway. It is, in my opinion, land by reason of its annexure to the soil. It has also another character, and that is that it is a right-of-

way running over the soil, and in that respect being land, by virtue of it being a plant and substance in the soil, neither being an incorporeal hereditament. It partakes doubly of the nature of land. It is land as a hereditament incorporeal; it is land as an object planted in the soil. Now section 11 of *The Acts Shortening Act* is the part referred to, and that enacts that the word "land" shall include "messuages, tenements, and hereditaments corporeal or incorporeal, of any tenure or description, and whatever may be the estate or interest therein, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure, or to some particular estate or interest therein." *The Valuation and Rating Act* is as large as it possibly could be in its expression. It says all land is rateable for the purposes of that Act, and that "in the valuation of land, the following rules shall be observed." Well, that being so, for these reasons I think it is certainly rateable. I cannot see any reason for holding anything else; but it is suggested that there would be such extreme difficulty in rating it, that therefore it could not possibly be rated. I don't think we are concerned—in fact, we are not concerned—in that to-day. If there had been any question of the principle upon which rating would proceed, of course that would have had to be determined, because that would be a matter of the interpretation of the law. The simple question we have to decide, however, is whether it is rateable property. It is so declared by section 82 of *The Railways and Tramways Act*. If it is land, then the whole question is included; it is rateable property, and it is property that is rateable under *The Valuation and Rating Act*. I don't know, but it seems to me—of course, I am not here to give an opinion as to what shall be the basis of the valuation—that that must be left to skilled valuers, and it would be essential that they should state the principles upon which they proceed. That would be a matter for another time. When it comes before us, however great the difficulty may be, it will be

for us to say whether it has been properly rated. If it is an impossibility, why, then we shall say it is rateable property which cannot be rated. But we won't anticipate anything like that. I hold that the tramways are rateable. Reverse the decision, and remit the case back to the police magistrate, with the opinion of the Court that the tramways are rateable.

HARDING, J.: I am entirely in accord with the judgment of The Chief Justice. It appears to me possible to take a much shorter cut to the same result in the construction of section 82. Section 82 of *The Railways and Tramways Act* enacts that "every tramway constructed or worked by a company or other persons under the provisions of this Act shall be deemed to be rateable property within the meaning of the laws in force for the time being for the government of municipalities or divisions." Now, if we look to *The Valuation and Rating Act*, we find that that Act is, by means of the interpretation clause, an Act which provides for the valuation and rating of rateable land by municipalities, divisions and so and so. They are the persons referred to in section 82, and under section 82 a tramway is rateable property within the meaning of the Act. What is rateable property? Under *The Valuation Act of 1884* land and nothing else. Consequently, property being land, the tramways being property and therefore land, are, under *The Railways and Tramways Act*, rateable. Section 82, thus interpreted, says the tramways shall be deemed land for the purpose of the Act.

REAL, J.: I concur.

Decision reversed, and remitted to the police magistrate.

Solicitors for appellants: *Macpherson, Miskin & Fees*.

Solicitors for respondents: *Hart & Flower*.

Re E. Y. LOWBY, AN INSOLVENT.

Insolvency — Jurisdiction — Northern Supreme Court—Insolvency Act of 1874 (38 Vict., No 5), ss. 25, 114.

The Insolvency Courts sitting at Brisbane and Townsville are auxiliary to one another, and therefore there is jurisdiction in the Court at Brisbane to fix an examination before a judge of the Northern Court.

The order of The Chief Justice (*ante* 78) affirmed.

In this matter an order had been made by The Chief Justice for the last examination of the insolvent before a judge of the Northern Court. The judges of the Northern Court doubted their jurisdiction in the matter, and Mr. Justice Chubb refused to exercise the duty of an Examining Court, *ante* 101. The Chief Justice then referred the matter to the Full Court.

Byrnes, S.G., and *W. A. D. Bell* for the Crown, moved for an order in terms of that made by The Chief Justice on July 15th.

HARDING, J.: You ask for an order which is already on the file.

Byrnes, S.G.: The matter is here as if by way of appeal.

HARDING, J.: Whether the order is good or bad, it is an order of the Court, if it has been drawn up, until it is upset, and every one must obey at his peril.

Byrnes, S.G.: Mr. Justice Chubb says he will obey the order if he is ordered by the Full Court.

THE CHIEF JUSTICE: That is a reference to us, and I sent it here.

Byrnes, S.G., moved for an order that the insolvent attend before a judge of the Northern Court at Townsville to pass his last examination, at such time as the judge shall appoint; and further, that all necessary advertisements be inserted in the local papers after the time is so fixed, and the necessary notice be given to the trustee in insolvency; and further, the memorandum of the last examination of the insolvent sworn to and the evidence taken, if any, upon such examination, be returned to the Supreme Court of Brisbane. Section 4 of *The Insolvency Act of 1874* defined the meaning of an examining court as any "court or magistrate before whom any person is ordered to attend for examination under this Act." The power given the Court to order another court was provided in section 23: "If in any proceeding in insolvency there arises any question of fact, which

the parties desire to try before a jury, instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may direct such trial to be held before itself or some other competent court accordingly, and shall settle the form in which such statement of fact shall be stated for trial, and shall give all necessary directions for the purpose of such trial." Section 114 showed the Court had power to order an insolvent to attend before it, or before any other court of insolvency, or before any police magistrate, at a time to be specified in the order, for the purpose of being examined as to the disposal of his property. That gave the Supreme Court power to make any court an examining court for the purpose of aiding its jurisdiction. [HARDING, J.: The Northern Court is this Court. How is it separate?] It has a separate jurisdiction with limited powers, and therefore it is another court of insolvency. Under section 182 "any evidence or depositions taken before any examining court shall be transmitted to the court having jurisdiction in the insolvency, if the last-named court be not the examining court." Rule 166 of the Supreme Court also provided for the return of any evidence given in another court. But section 25 of *The Insolvency Act* really covered the whole ground. That provided "all courts of insolvency, and the officers of such courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of the court seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdiction." If the other sections did not give sufficient power, this clearly did. It was similar in effect to section 188 of *The Imperial Act*, under which The Chief Justice some years ago entertained an application from the Supreme Court of Victoria to examine a man at St. Helena. The case was *In re Turnbull*, 2

Q.L.J., 181. On the authority of the 25th section, the Supreme Court can make the order, that the Northern Court is an insolvency court within the meaning of *The Insolvency Act*, and that there is nothing mandatory in The Chief Justice's order, as the northern judge can fix his own time for the examination.

HARDING, J.: This is an application by the Solicitor-General that an order may be made to fix the last examination of the insolvent before the Northern Court, or a judge of the Northern Court, at Townsville, with the necessary return of the record of the examination. The matter, in my opinion, would have been dealt with by His Honor The Chief Justice as fully as we can deal with it here, but His Honor has desired that the matter should be dealt with by the Full Court. Under these circumstances, I think that the Court has the right to seize and take possession of any application or reference to it. Now the necessary facts preliminary to the application exist, and the only thing for us to consider is the power to make, and the form of, this order. The Supreme Court of Queensland consists of a number of judges. We, my brothers and myself sitting on this bench, have jurisdiction throughout the whole of Queensland, both original and appellate. We exercise to the last resource in this colony the function of the Supreme Court; and each judge now sitting on this bench has, where it is desirable in certain cases, and in all cases where it is especially mentioned, the power to exercise certain, if not all the powers of the Court, in its Chambers or in its separate Court. I mention that, because I think that this order, made by The Chief Justice, would have had just as much virtue as it would if it had been made by this Court, composed of three judges. The order of one judge, until his order is appealed from and reversed, is valid, and is the order of this Court. The rest of the judges of this Court have been located in the Northern District, I think it is called, and reside at Townsville, where they hold their Court, and exercise powers of this Court, but always subject to appeal in the last resort to this Court. Consequently,

when exercising the powers of this Court, they exercise, amongst other things, the jurisdiction in insolvency, and are a court of insolvency, and, when exercising that jurisdiction, they are either singly or together a court of insolvency duly constituted within that part of the colony of Queensland. Now, referring to the section which has been referred—section 25 of *The Insolvency Act of 1874*—I find that all courts of insolvency (by which I understand all courts of insolvency within the colony, or which our Legislature legislates for as courts of insolvency) respectively shall severally act in aid of and be auxiliary in all matters in insolvency. This section enacts “all courts of insolvency, and the officers of such courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of insolvency, and an order of the court seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdiction.” That being so, there are at least two courts of insolvency in Queensland—that is the Supreme Court in Brisbane sitting in insolvency, and the Northern Court sitting in insolvency in Townsville. These courts, being courts of insolvency by the law, have severally to act in aid of and are to be auxiliary to each other in all matters of insolvency. Now, what is the meaning of being auxiliary to each other? To render assistance to each other. Here is a case in which this Court has thought it desirable that an examination should be taken within the colony of Queensland, but in that part of it which is within the jurisdiction of the Northern Court, the court auxiliary to it. That being so, I think it is a common and proper order to make to fix the Northern Court as the place at which the insolvent may pass his last examination at such time as shall be appointed by a Northern judge. Consequently, I think this order should go as moved for.

REAL, J.: I am of the same opinion. It is difficult for me to understand how the judge should for one moment doubt his power. Section 3 of *The Supreme Court Act of 1889* defines that Northern judges shall mean Northern judges of the Supreme Court, and that Northern Court shall mean the court of the Northern judges. The whole of these judges, it is provided, are judges of the Supreme Court. The judges sitting here exercise jurisdiction over the whole of the colony. The judges sitting in the north are judges of the same court, exercising jurisdiction within the limits provided by section 11, but having all the same powers. Being judges in insolvency, they have received the same powers and authority as the judges sitting here, the only difference being that, by section 11, their right to exercise that jurisdiction is limited by the locality which has been defined as the Northern District. At present the difficulty to me, therefore, is how the judge could suppose for one moment that he had not authority to entertain this application. Section 25 provides the means for one court sitting in one place asking assistance from the other. That appears to me to have been done in this case. The insolvent residing in Townsville, where the police magistrate would be precluded from acting, applied to the Court, or to the judge in Chambers, for an order permitting him, the judge having control over his insolvency having consented, to appear to pass his last examination. That order was made. If it were made in Brisbane, I cannot see that there would be any trouble. We would have taken it. All we should say is, “Has the judge given you permission to appear?” If he has, we would take it at once. The effect of the permission was to make it possible for the applicant to appear before another judge, and ask him to appoint a day for his last examination. It seems to me difficult to understand how the judge could have supposed that he had not jurisdiction. As for any want of courtesy, I cannot imagine that there was any. I think he must misunderstand judges, if he believes any of his brother judges would possibly offer any discourtesy to him or to one another.

LILLEY, C.J.: I am of the same opinion. I was very much surprised to find this interruption in the Northern Court. It seems to me that, under the Statute and the Rules of Court, there is ample power for a judge to make an order such as this, and it is incumbent on the judge to whom that order is presented to offer facilities for, and not in any way interrupt, the course of justice. I am at a loss to discover on what grounds the judge founded his doubts as to his jurisdiction to entertain the insolvent's application. I must say, and I think it is essential that I should say, that if insolvents are to be driven to such a resource as this—for two or three applications put them to considerable expense—if in the immediate jurisdiction where justice could be so easily and cheaply done, they are to come here by way of appeal, or are to be forced by refusal here to go to Charters Towers or Rockhampton, or to come back to Brisbane in defence—men that are supposed to be impecunious—well, this burden of the Northern Supreme Court will become intolerable. I think it essential to say so, because I think one of the judges is exceedingly sensitive to ever imagine or say that another judge has used anything like discourtesy to him. As the judge against whom that accusation is made, it is essential that I should repel it. I have not thought of doing anything out of the ordinary course. The order made by me, as pointed out by my brother Real, was an every-day order made here—a permissive order, giving the insolvent leave to go before the Chamber judge and to have his business dealt with, that is, his examination or his certificate, or whatever it may be. In this case I had necessarily to frame an order that would amount to getting leave to get an appointment for the taking of the insolvent's last examination, because I was not aware of the Chamber days of the judges, and was certainly not aware of the particular day on which the order made would be presented to the judge, or what judge it might be presented to. The order was, in fact, strictly in proper form. I don't think I need say more. I hope it won't occur again, and we shall hear no more charges of

discourtesy based upon such slender ground. The Northern judges may be assured that they will receive from the judges of this Court the utmost consideration and courtesy. As to the objection to the order that it contained a mandate, there was, in fact, no mandate to either the judge or the insolvent. The order was a purely permissive one. I am quite sure I should not have troubled myself about it, unless the Trustee in Insolvency had wanted the man to pass his last examination. The order will be as moved.

Order accordingly.

WALTERS v. ELDRIDGE AND OTHERS.

Trustee—"Sole use and benefit"—*Joint tenancy*—*Possession*—*Real Property Act of 1861, ss. 1, 3, 40, 77, 78.*

By a nomination of trustees, the defendant, J. Walters, transferred to trustees certain lands in trust, "for and on behalf of W. W. (a minor), and S. G. W., wife of J. Walters, and for their sole use and benefit." The said S. G. W. died, leaving W. W. surviving: W. W. then died, having devised all his real estate to the plaintiff.

The defendant, J. Walters, never gave up possession of the lands to the plaintiff, or any person entitled under the said nomination of trustees.

The plaintiff claimed possession of the said lands.

Held, on demurrer, that the words constituted an estate for life only; that there was no instrument under *The Real Property Act*, and that the word heirs ought not to be imported.

STATEMENT OF CLAIM.

1. The plaintiff is a widow residing in Southport in the Colony of Queensland.

2. The defendant John Walters was at the time of the execution of the instrument of nomination of trustees next hereinafter mentioned the registered proprietor in fee simple free from encumbrances under the provisions of *The Real Property Act of 1861* of all that piece of land being subdivision 4 of allotment 4 of section 6 in the parish of North Brisbane in the Colony of Queensland containing by admeasurement 16 2/10 perches more or less.

3. On the 11th day of November 1865 the defendant John Walters by an instrument of nomination of trustees transferred all his estate or interest in the said subdivision 4 to one John Downing and the defendant Robert Ogilvie as trustees of the same under the provisions of the said *Real Property Act of 1861* and by the schedule of trusts to the said instrument it was agreed that the said subdivision 4 should be held upon the trusts expressed in the words following (that is to say) upon trust "for and on behalf of William Walters (a minor of the age of eleven

years) and Susanna Gartside Walters wife of John Walters and for their sole use and benefit."

4. The said instrument of nomination of trustees was shortly after its execution duly registered in the Real Property Office under the provisions of the said *Real Property Act of 1861*.

5. The defendant John Walters was at the time of the execution of the instrument of nomination of trustees hereinafter mentioned the registered proprietor in fee simple free from encumbrances under the provisions of the said *Real Property Act of 1861* of all that piece of land being subdivision 3 of the said allotment 4 of section 6 in the parish of North Brisbane in the Colony of Queensland containing by admeasurement 13 9/10 perches more or less.

6. On the 23rd day of April 1874 the defendant John Walters by an instrument of nomination of trustees transferred all his estate or interest in the said subdivision 3 to the defendants Charles Baldwin and John Smith as trustees of the same under the provisions of the said *Real Property Act of 1861* and by the schedule of trusts to the said instrument it was agreed that the said subdivision 3 should be held upon trusts expressed in similar words to those contained in the said schedule to the said instrument of nomination of trustees of the 11th day of November 1865 except that the said William Walters is therein described as an infant of the age of 19 years.

7. The last-mentioned instrument of nomination of trustees was shortly after its execution duly registered in the Real Property Office under the provisions of the said *Real Property Act of 1861*.

7A. The said John Downing died on the 24th day of June 1870.

8. The said Susanna Gartside Walters died on the 11th day of December 1887 leaving the said William Walters her surviving.

9. The said William Walters died on the 26th day of September 1890 having first duly made and executed his last will and testament in writing whereby he devised all his real estate to the plaintiff and appointed her sole executrix thereof and the said will was duly proved by the plaintiff in this Honourable Court in its ecclesiastical jurisdiction on the 8th day of December 1890.

10. The defendant John Walters never gave up possession of the said subdivisions or either of them or any part thereof respectively to the plaintiff or any other person or persons entitled thereto under the said instruments of nomination of trustees or either of them.

11. The writs in these actions were respectively issued against the defendants William Gates Eldridge James Eaton Ellen Bradbury Leo Hester and James Kay who then were and still are wrongfully in possession of different parts (together making up the whole) of the said subdivisions transferred by the said nominations of trustees.

12. Since the issuing of the said writs the defendant John Walters who claims that he is in possession of the said subdivisions by the said other defendants his tenants has been pursuant to five consent orders dated respectively the 7th day of January 1891 admitted to appear to these actions and to defend for the whole of the property

claimed therein and he has accordingly entered an appearance in the said actions respectively as landlord of the other defendants.

The plaintiff claims -

1. To have possession of the said subdivisions 3 and 4 of allotment 4 of section 6 in the parish of North Brisbane in the Colony of Queensland.
2. £500 for mesne profits of the premises till such possession shall be given.
3. A receiver.

DEMURRER.

1. This defendant demurs to the plaintiff's statement of claim and says that the same is bad in law on the following grounds—

1. That it does not disclose that any right or title to the possession of the lands therein mentioned or any of them is or was vested in the plaintiff as against this defendant.
2. That it does not appear that the plaintiff or any person through whom she claims was ever expelled or ousted from the said lands or any of them by this defendant.
3. And upon other grounds sufficient in law to sustain this demurrer.

2. This defendant also demurs to so much of the plaintiff's statement of claim as relates to the lands in paragraph two thereof mentioned upon the further ground—

That the said statement of claim discloses that the right and title (if any) to the said last mentioned lands did not accrue to the plaintiff or any person through whom she claims within twenty years of the commencement of this action and that such right and title (if any) was and is extinguished by virtue of *The Distress Replevin and Ejectment Act of 1867* and upon other grounds sufficient in law to sustain this demurrer.

Charles Baldwin, John Smith, and Robert Ogilvie, were added as defendants by order of the Court.

Griffith, Q.C., A.G., and *Shand*, for the defendant, John Walters, in support of the demurrer.

Byrnes, S.G., and *Pain*, for the plaintiff.

Lilley, for the defendant Baldwin, to submit to the order of the Court.

On the application of the *Solicitor-General*, service on the defendant John Smith, was dispensed with by sec. 87 of *The Trustees and Incapacitated Persons Act of 1867*.

Griffith, Q.C., A.G.: This is an action by a *cestui que trust*, for possession against a trustee in possession. The case arises on two settlements dated 11th November, 1865, and the 23rd April, 1874, in trust for one William Walters, who died in September, 1890, having devised all his real

estate to the plaintiff. The defendant, John Walters, never gave up possession. William Walters came of age in 1876. As to the demurrer, the first question is one of construction. The words are not those of the Act. There are no words of limitation. By *The Real Property Act of 1861*, sec. 1, all former Acts are repealed. By section 3, "proprietor" shall mean "any person seised or possessed of any freehold or other estate or interest in land, at law or in equity, in possession in futurity, or expectancy." According to the old rules, the words constituted only an estate for life. In *Massy v. Rowen*, L.R. 4, H.L. 288, it was decided that the word "sole" has not a fixed technical meaning in a will; in a marriage settlement it may. If the estate here was not for life, it must be divided between the plaintiff and the defendant John Walters. It is not within sec. 3. If it is not a life estate, it is a tenancy in common in fee. Section 40 of *The Real Property Act of 1861*, deals with joint tenants and tenants in common. Effect cannot be given to the word "sole" without making it a tenancy in common. The words here should be read, in trust for W. Walters and his heirs, and S. G. Walters and her heirs, and for their sole use and benefit, if *The Real Property Act* applies. Section 77 of *The Real Property Act* deals with the nomination of trustees. By section 78, trusts may be declared. Equitable limitations follow the legal presumption of resulting trust. *Lewin on Trusts*, 8th ed., 109. A grant to A and his heirs, and to B and his heirs, is a tenancy in common. *Elphinstone*, 279; *Doe v. Musson*, 4 M. & W., 229; *Re Tiverton Market Act*, 20 Beav., 374. If the word "heirs" is introduced, then the words "sole use and benefit" indicate that both are to have a user and benefit. If there was no survivorship, her husband could only give her half. This is not an action for an undivided moiety, it is an action for ejectment. There is no ouster. *Doe v. Jeff*, 1 Camp., 173. As to the twenty years' limitation, *Hovenden v. Armesley*, 2 Sch. & Lep., 119; *Wing v. Reed*, 16 C.B., 652, 24 L.J., C.P., 100, cited. If the trustee was out of

possession for twenty years, the *cestui que trust* loses.

Pain: The word "heirs" should be introduced. *The Real Property Act*, sec. 77, and *Form I*, in the schedule, deal with the nomination of trustees. Section 3 defines an instrument. As to the nature of the equities, section 51 of *The Real Property Amending Act of 1877*, was cited. *The Acts Shortening Act* would make the grant read as a grant to W. Walters and S. G. Walters and their heirs; which is the ordinary form of limitation for a joint tenancy, some words of severance being necessary to create a tenancy in common. *Massy v. Rowen*, decides that the words "sole use and benefit" have a known meaning. (See the judgment of Lord Hatherley at p. 298). *Elphinstone*, 283, also was referred to, to shew that the words constituted a joint tenancy.

LILLEY, C.J.: We are all agreed that this is not an instrument executed under *The Real Property Act*, but in fact, has to be interpreted as a strict instrument, and that the old Common Law rule must prevail. Therefore, it would read as a gift, a trust in which the trustees would undoubtedly have the fee simple, the life estate for the benefit of the son and the wife. The statute clearly separates, and in fact, recognises a trust as in no way affecting the rights that are given in the estate, to the party in whose favor the trust is made. In respect to the equitable consideration, the instrument, according to my interpretation of it, gives merely a life estate. If the word "heirs" cannot be imported, then the two parties are dead. The son and the wife are dead, and their life estate has been extinguished, and there is a resulting trust in favor of Walters. His possession is consistent with that estate, and he cannot be taken to be in possession for the benefit of other parties claiming only a life estate. The life estate having been extinguished, has left really nothing after their decease. Now the question is, can the word "heirs" by any construction of the statute of 1861, be imported into this schedule. I think we cannot import into it the word "heirs" by forcing the interpretation of

the terms embodied in the statute. The describing portion of the section says:—"The describing any person as proprietor, transferor, transferee, mortgagor, mortgagee, encumbrancer, encumbrancee, lessor or lessee, or as trustee, or as seized of or having any estate or interest in any land, shall be deemed to include the heirs, executors, administrators and assigns of such person."

Now there is no description in this schedule other than the description which is in accordance with the old Common Law rule, and which gives an estate for life. The parties are not in any sense described either as transferees or as persons having any estate or interest in the land. I think that must relate to an instrument executed under and in accordance with the terms of the statute. I have said that this schedule is not an instrument of that kind, and therefore, that being gone, the demurrer must in fact be allowed.

HARDING, J.: I am entirely of the same opinion.

REAL, J.: I am also of the same opinion. It appears to me that it was incumbent on the plaintiff to show first, that it was an instrument executed under the Act, and second, that the provisions of the second last subsection of section 3, was such as to make it necessary that the word "heirs" and no other word could be read in this section. I think it fails on both grounds. An instrument under the Act—I take it by this instrument they have an estate under the Act—should be dealt with by the provisions of the Act. I think that the describing words in this subsection, which mentions proprietor, give the key, as it were—if any key were necessary—to the first part of section 3. I therefore think, that the provisions and the words of this schedule, can receive no assistance from the provisions of *The Real Property Act*. If however, this section was capable of such a construction that this schedule could be deemed to be an instrument under the Act, I still think that the provisions of the second last subsection would not render it proper to read in the word "heirs." I think that the Common

Law interpretation ought still to be used in this case. First then, this is not an instrument executed within the meaning of section 8, and second, if it were, it would not be necessary to read the word "heirs," and therefore, would not have the effect of giving an estate in fee.

Demurrer sustained, with the costs of all parties against the plaintiff.

Solicitors for plaintiff: *Wilson, Newman-Wilson & Hemming*.

Solicitors for defendants: *MacPherson, Miskin & Pezz*.

NOVEMBER SITTINGS OF THE FULL COURT.

O'MARA v. NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALIA, LIMITED.

Life Insurance—Overdue Premiums—Authority of Agent—Lapse—Estoppel.

The plaintiff's wife being insured in the defendant company, the premium became overdue. By the conditions of the policy, a period of 45 days' grace was allowed where premiums were in arrears; after which the policy was to be void, but the directors might at any time after the forfeiture revive the policy on such terms as they liked.

After the lapse of the days of grace the plaintiff paid the premium to the defendants' agent at B, and a receipt was given him for the money.

The agent had authority to receive overdue premiums after the lapse of the days of grace.

The company, by express notice, had required that a satisfactory account must be given of the present health of the person seeking to make a renewal.

The defendants knowingly permitted, before 26th July, 1889, their agent to receive payments of overdue premiums, where the policy had become forfeited, without proof of good health of the person assured at the time of such payment. The plaintiff and his wife were aware that the defendants' agent was in the habit of receiving overdue premiums without proof of good health. All the parties were aware that the agent had no authority to take the payment of overdue premiums without such proof after the 26th July, 1889. The premium was paid on 13th November, 1889, being after the due date and the days of grace, and the assured died on the 14th November, 1889.

Held (affirming the decision of Real, J.) that there must be judgment for the defendants.

Semble, an insurance company granting grace several times is not estopped from insisting upon the conditions of their policy.

MOTION for a rule *nisi* to set aside the judgment entered in this case for the defendant company, and to have judgment entered for the plaintiff on the grounds: That the defendant company, by their acceptance of the quarterly instalment of the premium after due date and after the expiration of the days of grace, and by the issue of the receipt signed by the general manager of the defendant association, and countersigned by the local manager, waived any forfeiture that might have arisen, and that the defendant company, having by their course of business induced the plaintiff to believe that the non-payment of any quarterly instalment of a premium on the due date or before the expiration of the days of grace would not involve a forfeiture of the policy, were estopped from insisting upon such forfeiture after such instalment has been paid.

The action was tried at Bundaberg before Mr. Justice Real on the 17th September and following days. It was brought to recover £1000 and the sum of £9 12s. bonus additions on a life policy which had been effected upon the life of the plaintiff's wife, Margaret Gertrude O'Mara. The quarterly instalment of the annual premium due on 6th September, 1889, was paid on 13th November, 1889, being after the due date, and after the expiration of the days of grace. The plaintiff obtained from the local agent a receipt signed by the general manager in Brisbane, and countersigned by the local manager, continuing the policy until 6th December, 1889. The plaintiff's wife died on 14th November, 1889, the day after the premium had been paid, and the defendants refused to pay the money. The jury in the case gave answers to the questions put by his Honor, which his Honor interpreted to be in favour of the defendant company. The plaintiff now sought to set aside his Honor's judgment, and have judgment entered in his favor.

Drake, for the plaintiff, in support of the rule cited *Phoenix Life Assurance Co. v. Sheridan*, 8 H.L.C. 745, 752; *Maddick v. Marshall*, 16 C.B. (N.S.) 393; *Accey v. Fernie*, 7 M. & W. 151; *Wing v. Harvey*, 5 De G. M. & G. 265; *Insurance*

Co. v. Wolff, 95 U.S.R. 326; *Insurance Co. v. Eggleston*, 96 U.S.R. 572; *Thompson v. Insurance Co.*, 104 U.S.R., 252; *Bunyon, Life Insurance*, 64-67.

LILLEY, C. J.: This is a motion for a rule *nisi* calling upon the defendant company to show cause why, upon the findings of the jury, the judgment of the judge, Mr. Justice Real, should not be set aside, and judgment entered for the plaintiff instead. The action was tried at Bundaberg, and his Honor submitted a series of questions to the jury; and this motion is now made upon the answers or findings of the jury in reply to his Honor's questions. The wife of the plaintiff O'Mara was insured in the defendant company for a thousand pounds, and there was a small sum which had accrued by way of profit or premium on the insurance, making the whole of the claim £1,009 12s. The premiums had been paid for some time, but with regard to the last premiums, they were undoubtedly overdue and unpaid, and the days of grace, amounting apparently to 45 days altogether, had expired; so that the policy, in the technical language used by the parties in the instrument—had lapsed; and it was only by some act of grace or by some conduct on the part of the defendants that it could be continued or revived. Now, the contention of the counsel for the plaintiff O'Mara was that it had been so revived or continued. It appears that the fact upon which they found this contention is this: After the lapse of the days of grace, amounting in all to some 45 days, the plaintiff O'Mara went to the agent of the defendant company and paid the quarter's premium, or some money, sufficient at all events to discharge what was due, or what might have been demanded for the revival of the policy, and a receipt was given to him for that money. Under ordinary circumstances that would have revived the policy, but if the days of grace had elapsed, and unless the agent had authority from the company to accept that payment and to continue the policy, or unless by any express authority, or unless by some conduct on the part of the directors of the company

that the act of the agent is to be taken as equivalent to an express renewal or continuance of the policy, the plaintiff must fail to establish his claim. Now, as to the 11th and 12th questions, it is contended of course upon the answers, the findings of the jury—they are admitted to be correct—that upon these findings the plaintiff is entitled to have the judgment set aside, and to have judgment entered for him. Now, upon the 11th and 12th questions and answers, the jury found this: (a) that their agent—the agent of the company at Bundaberg—was duly authorised to receive overdue premiums after the expiration of 45 days from the due date thereof; (b) that such payment being accepted by the agent would revive the said policy and waive any forfeiture for the unpunctual payment of such premiums. So far that is good, but then there is another consideration to which his Honor directed the attention of the jury, and which he held in reserve for further questions, as he might well do, and that is the question—Under what circumstances would the acceptance of the premium, or payment after the 45 days, revive the policy? There is another matter the company, by express notice, had required that the plaintiff should give a satisfactory account of, and that was the present health of the party seeking to make that renewal; so that his Honor, so far as the first question goes, said it would be answered in favour of the plaintiff. But then there was that further consideration to be investigated or to be submitted to the judgment of the defendant company before they could have been said to have revived the policy—In what condition was the party who was seeking to have benefit of the renewal of the policy?—before they could be said to have made a waiver of the condition which the company had insisted upon being complied with, viz., that they should have proof that the party was in a good state of health—such a state of health as to justify them in continuing the risk. Question 12 was—Did M. G. O'Mara make the payment to the defendants' agent on 13th November, 1889, relying on the defendants' general usage and practice to

permit the said agent to accept overdue payments, and in relying in particular on the defendants' previous practice in theretofore renewing the policy upon the payment by her of overdue instalments of premium to their agent at Bundaberg? The answer to that was "yes." Truly she might have done that, but her reliance might be futile. She might have rested upon a rotten stick, because, when you come to examine the policy, we find by section 1 of the conditions on the back of it that if any premium which ought to be paid in respect of the policy shall be in arrears for 30 days after it shall have become payable, then the policy is to be void, but there is a further extension of 15 days allowed. That made the time of grace forty-five days, provided always that the directors might at any time revive on such terms as they like any policy which may be forfeited. That was, having the power, they might exercise in one instance five, six, eight, or nine times in favour of that woman that act of grace, but that would not justify her in putting the construction of a waiver of their right upon their action, because in each case the directors had the right to require proof of good condition of health. If they chose to overlook that in one instance, they might overlook it in another, and might at last say at any time in the course of their dealing with the assured, "we are not able to allow you to fail in this way again." But then, in addition to that, we have the positive findings—the positive subsequent findings—of the jury in their answers to questions 13 and 14, findings which, as I have said, the Judge reserved. They had to give specific partial answers in questions 11 and 12. Then the Judge proceeded, in 13, 14, and 15, to deal with the question—Under what circumstances was the premium paid, and was it paid under such circumstances as would entitle the plaintiff to say that the company had waived their right of insistence upon the forfeiture after the lapse which did undoubtedly take place; or was the payment made under circumstances which would estop the company from setting up the question of forfeiture or lapse? Now, the question is—Did the company after the forfeiture

give express notice to Mrs. O'Mara—express notice by this circular and by the note in reinstating lapsed policies—that some satisfactory proof of present health was necessary? That is the question which the Judge reserved for further questions—the question which must be satisfactorily proved—that is, the condition of the person seeking to set aside lapse or forfeiture. Question 15 says—"Did the defendants at any time authorise or knowingly permit their agent to receive any payment of an overdue premium or instalment, where the policy had become forfeited, without proof of good health at the time of such payment of the person assured, and if at any time say what?" Now, the answer is this—"Not expressly authorised, but knowingly permitted, before July 26, 1889." But then there is no evidence whatever that any time after that date they ever permitted the receipt of money or the waiver of a lapse. Question 14 asked—"Did the said M. G. O'Mara and the plaintiff know that the defendants' agent at Bundaberg had any authority to receive any premium in respect to a policy which had become void, upon the non-payment of the premiums, without proof of good health?" The answer to this was, "Yes, knew it was the agent's practice." The next question was—"And did the defendants receive premiums falling due without the authority of the defendants' directors, and in direct contravention of instructions? The answer was "Yes" Well, now, by the answer to question 6, to which I now revert, the jury found, in reply to the question, "Had the defendants' agent any authority to receive premiums without proof of good health?" "no authority." We have to consider what is the law of agency applying to such a case. Here, on the part of the directors, there is no express authority—no authority either express or implied—to receive premiums without proof that the woman was in good health. We have the findings that she knew, and that all the parties knew—all the parties seeking to enforce the insurance knew—that the agent had no authority to take the payment of premiums after 26th July, 1889,

without proof of the condition of the health of the assured. No such proof is given, and so far as I can see, there being no authority, there being knowledge on the part of those concerned that there was no such authority, and there being a lapse, the receipt of the premium and the giving of the receipt were both unauthorised, and the plaintiff must fail. So far as estoppel is concerned, I see nothing in the findings that will justify me in finding that the Judge could give judgment in favour of the plaintiff on the ground that the defendant company were estopped from setting up this lapse. There is nothing in the evidence to show that the directors knew anything about these transactions. If they had any knowledge of the previous transactions, they were acting within the scope of the authority which permitted them to give grace from time to time. But it would, I think, be a dangerous thing to hold that if an insurance company granted grace a number of times, that therefore that would estop them from insisting upon the conditions of their agreement. It would especially, I think, be against the insured who might be seeking indulgence from time to time to hold that the granting of such indulgence estopped them from insisting upon the conditions of the policy. On the whole, I think the Judge was perfectly right in entering judgment for the defendants, and that judgment must stand. Therefore there will be no rule.

HARDING and REAL, JJ., concurred.

Rule refused accordingly.

Solicitors for plaintiff: *Powers & Robinson.*

IN CHAMBERS.

HARDING, J.

26th November, 1891.

CRANLEY v. FAHY.

Practice—Probate action—Default of pleading—Affidavit of scripts—Order XXI, r. 2.

In a probate action, the affidavit of scripts must be filed before the defendant can apply to dismiss an action for want of prosecution. The summons to dismiss should state the nature of the default.

SUMMONS to dismiss an action for want of pro-

secution, in that no statement of claim had been delivered.

An affidavit by J. P. Forde was filed by the defendant, from which it appeared that the defendant had entered an appearance to a writ of summons, and that the time for delivery of the statement of claim had long passed. The plaintiff had asked for an extension of time. On behalf of the plaintiff, the affidavit of C. B. Lilley stated that, on the receipt of the summons, a search had been made, and that no affidavit of scripts had been filed.

Groom, for the defendant, in support of the summons. The statement of claim is long overdue. The plaintiff must be taken to have waived the affidavit of scripts by asking for time.

Scott, for the plaintiff, submitted the summons should be dismissed. The words of *Order XXI*, r. 2, "but where the defendant has appeared, the plaintiff shall not be compelled to deliver it (the statement of claim) until the expiration of eight days after the defendant has filed his affidavit as to scripts," are imperative. The defendant has omitted a necessary step, and until that is done the plaintiff cannot be considered in default.

HARDING, J.: The summons should state the default. The words of *Order XXI*, r. 2, are imperative. The summons must be dismissed, but under the circumstances, I think, without costs.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitors for defendant: *Hamilton & Hamilton*.

HARDING, J. 9th December, 1891.

LEVY AND CO. v. BRYANT.

Practice—Final judgment—O. XIV, r. 1a—Setting aside judgment.

There is an inherent power in the Court to prevent an abuse of its proceedings, and a judgment will be set aside if the circumstances of the case require it.

SUMMONS to set aside an order dated the 4th December, and all further proceedings thereon.

Fitzgerald, for defendant, applied to set aside an order for final judgment, on the grounds that (1) the plaintiffs did not disclose all the facts;

(2) the defendant was taken by surprise; (3) writ not specially indorsed; (4) a good defence on the merits; and referred to *O. XXIX*, r. 14; *Hobson v. Plant*, cor. Mein, J., 27th April, 1886; and *Cavanagh on Summary Judgments*, 74.

HARDING, J. referred to 2 *Chitty's Practice*, 1283; *Daniel's Ch. Practice*, 6th Edit, 806; *Thompson v. Beeke*, 4 *Ad. & Ell.*, 759; *Beale v. Macgregor*, 2 *T.L.R.*, 311; *Re Portuguese Consolidated Copper Mines, Limited*, *Badman's case*, 62 *L.T.*, 179; *Russell v. Taylor*, 11 *C.B.*, 20, and *O. LVIII*; and was of opinion that there is an inherent in the Court to prevent an abuse of its proceedings, and a judgment will be set aside if the circumstances of the case require it on the authorities cited.

Perské, for the plaintiff, consented to the order being set aside on payment of the costs of, and incidental to the application, and on payment into Court of the money indorsed on the writ.

HARDING, J.: Order accordingly in form H 7. By consent within one month defendant to pay plaintiffs' costs of, and incidental to the application, and the order of the 4th December. Statement of defence eight days after the statement of claim.

Solicitor for the plaintiff: *Winter*.

Solicitor for the defendant: *Cohen*.

DECEMBER SITTINGS OF THE FULL COURT.

YEERONGPILLY DIVISIONAL BOARD v.

NEWMAN-WILSON.

Local Government—Rates—Divisional Boards Act of 1879, ss. 60-64, 70—Divisional Boards Act of 1887 (51 Vic.; No. 7), s. 4.

The defendant was the owner of certain land in Yeerongpilly Divisional Board, from October, 1883, and was sued by the said Board for rates due for the years 1883-1887. The defence set up was that the defendant did not at any time during these years receive notices of valuation, or notices that rates had been made upon the land.

In October, 1890, the defendant received notices purporting to bear date during the above-mentioned years, and notifying that an Appeal Court would be held.

Held, on demurrer, that as the rates were properly made and had become due, and all rights were preserved by the Act of 1887, the liability of the defendant continued, and the rates were payable.

DEMURRER.

AMENDED STATEMENT OF CLAIM.

1. The plaintiffs are the Board of the Division of Yeerongpilly and the defendant is and was at all material times the registered owner of certain lands being portion 403 in the parish of Yeerongpilly aforesaid which during all the times hereinafter mentioned were unoccupied.

2. There is due and owing from the defendant to the plaintiffs in respect of rates duly levied by the plaintiffs as and being such Divisional Board as aforesaid upon the said lands during the years one thousand eight hundred and eighty-three (1883) one thousand eight hundred and eighty-four (1884) one thousand eight hundred and eighty-five (1885) one thousand eight hundred and eighty-six (1886) one thousand eight hundred and eighty-seven (1887) respectively the sum of thirty-four pounds fifteen shillings (£34 15s. Od.) full particulars whereof have been supplied to the defendant and appear by the endorsement of the writ in this action.

3. All conditions have been fulfilled all times elapsed and all things happened necessary to entitle and nothing has happened to disentitle the plaintiffs to be paid the said sum of thirty-four pounds fifteen shillings (£34 15s. Od.) by the defendant yet the defendant has never paid and refuses to pay the same or any part thereof.

The plaintiff claims:—

1.—£34 15s. Od.

2.—Such further and other relief as the nature of the case may require.

AMENDED STATEMENT OF DEFENCE.

1. The defendant admits that he has been the owner and registered proprietor under the provisions of *The Real Property Act of 1861 and 1877* of the lands in paragraph 19 of the Statement of Claim mentioned since the 10th day of October 1883 but he denies that he was such owner before that date.

2. The defendant denies that during the years 1883 1884 1885 1886 or 1887 or at any time any rates were duly levied by the plaintiffs upon the said lands in respect of the said years or any of them or that there is due or owing from him to the plaintiffs in respect of rates levied by the plaintiffs upon the said lands during the said years or at any time the sum of £34 15s. Od. or any sum.

3. The defendant says that save as hereinafter appears he did not at any time receive notice of valuation of the said lands or notices that rates had been made upon the same for the years in the last preceding paragraph mentioned or any of them.

4. On or about the 2nd day of October 1890 the defendant received certain notices from the plaintiff purporting to bear the respective dates June 30th 1883 July 1st 1884 July 1st 1885 and June 22nd 1886 save only that the dates were different the said notices were in form similar to each other.

5. The notice purporting to bear date the 30th day of June 1883 was in the words and figures following:—

“Yeerongpilly Division

“No. on Rate Book 228

Subdivision No. 3

“Description of property

land

“Re-subdivision

of Subdivision

“of Section

“Portion 403 Parish of Yeerongpilly County of Stanley

“June 30th 1883

“To Mr. J. R. Newman Wilson

“Take notice that the property above of which you appear to be the occupier or owner has been assessed at the net annual value of 139 pounds If you object to such valuation you may appeal against it in the Court of Petty Sessions at Rocklea within one month after the date of this notice Notice of appeal must be given in writing addressed to the Clerk of the Board Rocky Waterholes at least seven days before the sitting of the Court £139 : 0 : 0

“F. J. STREET

“Clerk of the Board

“Notice:—The Appeal Court will be held at the Board's Office Rocklea on Saturday the 8th of November next at 10 a.m.

“F. J. S.

“Rocklea 2nd October 1890.”

6. The said notice purporting to bear date the 30th June 1883 was accompanied by a letter which so far as is material was in the words and figures following:—

“Rocklea October 2nd 1890

“Take notice that rates on portion 403 parish of Yeerongpilly for the year 1883 appear in the rate books of this Division as payable by T. H. Coulsen and have now been altered to you as owner and person liable to be rated

“You have the same right of appeal under the 203rd clause of *The Divisional Boards Act* against the above alteration in the rate books as you would have against a valuation under *The Valuation Act*

“An Appeal Court will be held at the Board's Office Rocklea on Saturday the 8th of November next at 10 a.m. and notice in writing of your intention to appeal must reach me at least 7 days before the sitting of the Court.”

7. Each of the notices purporting to bear date the 1st day of July 1884 1st day of July 1885 and 22nd June 1886 was accompanied by a letter which so far as material was in the words and figures following:—

“Rocklea October 2nd 1890

“Take notice that the rates on portion 403 parish of Yeerongpilly for the year 1884 appear in the rate books of this Division as payable by R. and G. Wilson Bros. and have now been altered to you as owner and person liable to be rated You have the same right of appeal under the 203 clause of *The Divisional Boards Act* against the above alteration in the rate books as you would have against a valuation under *The Valuation Act*

"An Appeal Court will be held at the Board's Office Rocklea on Saturday the 8th of November next at 10 a.m. and notice in writing of your intention to appeal must reach me at least 7 days before the sitting of the Court."

8. On or about the 6th day of November, 1890, the defendant received notices from the plaintiffs bearing that date in respect of rates alleged to have been made by the plaintiffs for the years 1883 1884 1885 1886 and 1887 respectively. The said notices except that they referred to different years as aforesaid were in form similar to each other.

9. The notice in respect of rates alleged to have been made in the year 1883 was so far as is material in the words and figures following:--

"November 6th 1890

"Take notice that the sum of £8 : 19 : 0 being the full rate made by the Board of this Division for the year 1883 on property of which you are the occupier or owner in portion 403 numbered as above on the rate book for the Division is now due and is hereby demanded and unless the same be paid within sixty days of the service hereof it will be recovered by process of law

"Total sum now payable £8 : 19 : 0."

10. By reason of the premises the defendant denies that all or any conditions have been fulfilled all or any times elapsed or all or any things have happened necessary to entitle or that nothing has happened to disentitle the plaintiffs to be paid the said sum of £34 15s. 0d. or any sum.

11. And by way of further defence to the claim in respect of rates alleged to have been made in the years 1883 and 1884 the defendant says that the plaintiffs' alleged cause of action if any is barred by *The Statute of Frauds and Limitations of 1867*.

JOINDER OF ISSUE AND DEMURRER.

1. The plaintiffs join issue upon so much of the defendant's amended statement of defence as does not contain admissions of the plaintiffs' statement of claim or of any part thereof.

2. The plaintiffs demur to the defendant's amended statement of defence except the eleventh paragraph thereof and say that the same is bad in law upon the ground that it does not appear that the defendant's liability for the rates claimed in this action is affected or diminished by reason of the date at which the defendant first became owner of the lands in paragraph 1 of the statement of claim mentioned and that it appears that the notices received by the defendant are sufficient to entitle the plaintiffs to recover the rates claimed from the defendant and upon other grounds sufficient in law to sustain this demurrer.

3. The plaintiffs also demur to the amended statement of defence except the second and eleventh paragraphs thereof and say that the same is bad in law upon the grounds aforesaid.

4. The plaintiffs also demur to so much of the defendant's amended statement of defence as is contained in

paragraph eleven thereof and say that the same is bad in law upon the ground that *The Statute of Frauds and Limitations of 1867* is not a bar to the recovery in this action of rates levied during the years 1883 and 1884 or either of them and upon other grounds sufficient in law to sustain this demurrer.

Sir S. W. Griffith, Q.C., A.G., and Mansfield for the plaintiffs; *Byrnes, S.G., and Wilson* for the defendant.

Griffith, Q.C., A.G., after mentioning the facts as set out in the pleadings, stated that the question was whether, the notice not having been served on the right person, the right of recourse was lost by the Board or whether they could afterwards give notice to the proper person and retain their right to recover. In *Rockhampton Municipal Council v. Bennett*, 1 Q.L.J. 25, it was held the rates were recoverable. [CHIEF JUSTICE: The question is whether this is a debt which is affected by *The Statute of Limitations*.] There is no *Statute of Limitations* affecting it. *Payne v. Esdaile*, 18 Ap Ca. 618. As all the proper notices have been given, the question is whether they were given in time. Ss. 60, 61, 63, and 64 of *The Divisional Boards Act of 1879*, which was in force at the time, refer to rates. No provision was made for the notice to be given. The Statute required a notice to be given and afforded the right of appeal against the valuation, but did not state when the notice was to be given. Section 70 provided that if any person rated under the provisions of the Act should fail to pay any of the rates due by him for the space of 60 days after the demand therefor, a warrant should be issued to recover the debt. Sec. 24 of *The Divisional Board Amendment Act* provided that where any rateable property was unoccupied, and the rates had been left unpaid for four years, the Board might take possession of it and lease it. The next section limited the period of leasing to seven years, and allowed the owner thirty years to come in and redeem the property. There was, however, nothing requiring the notice of valuation to be given at any particular time. [REAL, J.: Instead of paying every six months the owner might have to pay twenty years right off.] [HARDING, J.:

Then he would be ruined.] But he would have had the benefit of not paying his debt for all that time. [REAL, J.: By holding back their notices for twenty years they could frequently in times of distress get possession of the land.] The owner in this case knew he had to pay rates when he took the land. There was a burden on the land which he was liable to pay, but which he had not to pay till he was called upon to do so. There was no statutory limit for the time at which notice was to be given, and there was no rule of law imposing one. According to the defendant's contention, the Board must lose for ever the rates if they did not send the notice within a certain period. Must the notice of valuation be given at a specified time? There was no statutory time prescribed. Apparently the obligation to pay did not arise until notice had been given and the opportunity to appeal afforded. [REAL, J.: Could rates be said to have accrued on any unoccupied land before notice had been given?] It may be a very nice point whether they would or not. The Act says rates which have accrued. [The CHIEF JUSTICE: Rates may be accruing, but may not have accrued. I can quite conceive how disagreeable it would be for an owner to be called upon to pay his rates all at once.] The fourth clause of *The Divisional Boards Act of 1887* provided—"And all rates which having accrued due in any existing division are, at the commencement of this Act, due and payable to or leviable by the Board of such division, shall be and continue to be so due, payable, and leviable, and may be paid to and received, levied, and recovered by the Board under the provisions of this Act." *Hornsey Local Board v. Monarch Investment Building Society*, 24 Q.B.D. 1, was cited.

Byrnes, S.G.: The effect of the 203rd section of *The Divisional Boards Act of 1887*, under which the plaintiffs purported to go, was clearly prospective and not retrospective. The rates were levied under the Acts of 1879 and 1882, and it was perfectly clear, from the combined effect of these Acts, that there must be a notice of valuation given to the owner or occupier of the land before

he became in any way liable to pay. In the case of *Ferguson v. Nundah Divisional Board, cor. Harding, J.*, 31st May, 1887, His Honor held that the distress levied to recover the rates was wrongful, because the two notices required by Statute had not been given. The Statute makes these notices a condition precedent to recovery. The Board could not arbitrarily fix the amount which was to be charged to a person. There was a right of appeal to the Court appointed for the purpose, and that Court decided what had to be paid. [REAL, J.: Supposing the right of appeal is reserved, what is to prevent the rate being made? There is an absolute duty imposed on the Board to make a rate, and they are not permitted to diminish it to less than fourpence. There is no time limited for giving notice, and it would give rise to a serious difficulty if the mere neglect of a clerk to give notice within a particular time should relieve persons from the rate.] It might be awkward for the Board, but they were instructed to give notices and had not done so. [REAL, J.: But the Act does not say what time they shall give the notice.] [The CHIEF JUSTICE: And it does not say that they shall lose the rates if they don't give the notice.] The two Acts under which the Board are levying have been repealed, and the question was what rights had been reserved. Section 4 of *The Divisional Boards Act of 1887* preserved existing rights. The Board should have been in a position to get in this money, and it was clear they were not in that position. They had recourse to section 203 of the Act of 1887, which gave the Board power to amend the rate book. [REAL, J.: No doubt, if they could recover this money, they would have to amend the rate book, even under the old Act. If the right to recover exists, the right to amendment must also exist.] If, after the rate had been struck, certain errors were discovered, the probabilities would be that the Board would correct them, but this correction would apply to one rate. After a new rate came in they would have a new rate book. If the rates were not due there was no power under the Act to recover them. Under

the Act of 1887, not only must the rates be accrued due, but they must also be payable and leviable. If, after the time of the passage of the Act, the Board gave notice to a wrong person that the rate had been made, they would be deprived of the right of recovering. In the case of *The Queen v. The Churchwardens of All Saints, Wigan*, 1 Ap. Ca. 611, there was a provision empowering the wardens to recover rates up to a period of twenty years. In the present case the Divisional Board were required to make a rate at least once a year, and the policy of the whole of these Acts was that they must, as far as possible, make their expenditure fit in with their rates. They could only borrow money from the Government, and could only get an overdraft equal to one year's income. [REAL, J.: The effect of this is that they have to make this rate fit the year. They cannot make a rate to cover the deficiency of the next year.] *Bradford Union v. Clerk of the Peace of the County of Wilts*, L.R. 3 Q.B. 604, shews that Acts are to be construed rigidly. The intention of the Legislature was to allow only a reasonable time to elapse, which, it was submitted, should be within the currency of the rate—that was within the year. Section 4 of the Act of 1887 preserved only the right to recover such rates as had accrued due.

Wilson followed.

Mansfield, in reply.

HARDING, J.: In this action the Yeerongpilly Divisional Board sue the defendant Newman-Wilson, for rates alleged to have been due on certain land of the defendant's, during the years 1883 to 1887. The rates for 1883 are abandoned; so now they are from 1884 to 1887, so far as this demurrer is concerned. [LILLEY, C.J.: They are to go with the decision—to abide the event.] HARDING, J.: Yes. The case for the defendant is that he never received notice of the valuation of the land, or that the rates had been made except as stated in paragraphs 4 to 9 of the statement of defence, which have been mentioned already. To this defence of the defendant demurrers have been filed, upon the ground that

it did not appear when the defendant first became the owner of the land. It appears that the notices received by the defendant are sufficient to entitle the plaintiffs to recover the rates. The plaintiffs also demur to the statement of defence, except as to the 2nd and 11th paragraphs thereof. There was also a demurrer to a certain part on the ground of *The Statute of Limitations*, but that has been abandoned. Upon that state of the pleadings, the question for decision is undoubtedly this: If the rates sued for were made in the years in which they are alleged to have been made, and any notices of valuation or demand were required by *The Divisional Boards Act of 1887*, could such notices of valuation and demand be thereafter given and the rates recovered by action? That being the short question for decision, we have to go to *The Divisional Boards Act of 1879*, and there we find sections 60, 61, 63, 64, and 70, more particularly bearing upon this point. In order to make a rate, the Board has, by section 60, to do one thing every year. That section provides for the making of a valuation of all rateable property within the division. So that it is upon that valuation, whether a correct one or not, which the Board have made under section 60, that the law requires the Board, under section 63, to make and levy rates—to be called a general rate. It appears that in these various years the Board did make such rates upon such valuations, and we think—that is the Court is of opinion—that these rates were properly made. It is not disputed but that they were properly made, and it is also indisputable so soon as the rate is properly made it becomes due, and whether or not it becomes payable at once is a different question. It certainly is a *debitum in presenti, solvendum in futuro*. That being so, and the rate being made, the latter part of section 60 required certain notices to be given. In other words, the rate having become due on this ordinary valuation set forth in section 60, the last subdivision of the section 61 provides means for the parties to settle how much is due—the exact quantum—not whether or no the rate itself was due, but the quantum of payment.

That being the position of affairs, and notice not having been given, there was passed *The Divisional Boards Act of 1887*, which repeals this Act absolutely, except so far as is provided in section 4, which says:—"That all rights and liabilities existing at the commencement of the Act, shall continue to be vested in, and may be enforced by the Board." Now, as I have said, the rate having been made, was due. Therefore, under section 4, it was a rate which had accrued due, and coming on at the commencement of this Act, was it also due and payable? I do not think that it was payable at the time, but it is to continue to be so due, payable and leviable. The Act of 1887 provides that there may be paid to, and received and levied, and recovered by the Board, under the provisions of this Act, rates and all penalties imposed under any of the repealed Acts. So that the rate being due at the time, it was still due under the 1887 Act. The old mode of recovery was taken away, and a new mode of recovery under the Act of 1887 provided. So far as that goes, I do not think there is any doubt at all. With reference to the rest of the appeal, it seems so hard that, were it possible to find a way out of it, I should strain every point to do it—and I have done so. I cannot, however, see a way out; and, feeling as I do that I must go on, I cannot help recognizing that there is no saying that is truer than "that hard law makes bad law," but the argument arising from that must be thrown aside, and the strict construction, however revolting it may be, must be held on to. Now you have it that the rates are due, but you have not got that they are payable. But if you go to the end of section 4 of the 1887 Act, you find that all rights are preserved. Now one of the rights under the old 1879 Act was to give a notice and to have an Appeal Court if necessary; and upon the exercise of that by the Board, the consequent liability of the ratepayer arose and attached. Consequently, under the 1887 Act, the right and liability—the right to give and the liability to receive a notice—was preserved if properly given. The right to have a Court of Appeal appointed

and the liability to pay rates accrued due continued, and under this Act became payable under section 4, and recoverable by the process appointed, by the Act of 1887. So far as one is able to see, the notices and other requirements of the Act of 1887 have been complied with, and it is not disputed but what the correct steps to make the liability of the ratepayer attach have been taken. That being so, the demurrer is to be allowed. I may say, as I have said before, I have fought against this decision as much as I possibly could from the beginning, but I believe it is the right decision.

LILLEY, C.J., and REAL, J., concurred.

Demurrer allowed accordingly without costs.

Solicitors for plaintiffs: *Thynne & Goertz*.

Solicitors for defendant: *Chambers, Bruce & McNab*.

BRISBANE CRIMINAL SITTINGS.

REGINA v. JOHNSON.

HARDING, J. 20th November, 1891.

Criminal Law—Insolvency Act (38 Vic. No. 5).

ss. 31, 207—Married Woman—Separate Property—Married Women's Property Act (54 Vic., No. 9), s. 3, sub. 5.

A married woman having separate property is liable to be convicted for an offence under *The Insolvency Act of 1874*.

INFORMATION against Catharine Mary Agnes Johnson, for feloniously quitting the colony within four months before the presentation of a petition for adjudication, and taking with her property to the amount of £50 and upwards, being a married woman with separate estate.

Power and Mansfield for the Crown. *Gore Jones* for the prisoner.

HARDING, J., raised the preliminary question as to the liability of a married woman under *The Insolvency Act*.

Mansfield: The information is laid under sec. 207 of *The Insolvency Act*. By sec. 31 of that Act the provisions of the insolvency laws apply to all debtors resident in the colony. By the *Married*

Women's Property Act of 1890, s. 8, sub. 5, every married woman shall, in respect of her separate property, be subject to the insolvency laws in the same way as if she was unmarried. The prisoner had separate property. *Eversley on Domestic Relations*, 292; *Williams' Bankruptcy Practice*, 315, 316; *Duffy and Irvine, Married Women's Property Law*, 149, 151; *Re Gardner*, 20 Q.B.D. 249; *Holtby v. Hodgson*, 24 Q.B.D. 108; *Scott v. Morley*, 20 Q.B.D. 121.

HARDING, J., directed the jury, who found the prisoner guilty, with a recommendation to mercy on the ground that the prisoner was not altogether a free agent in the matter. It was also suggested by a juror that a married woman was supposed to obey her husband.

HARDING, J.: That presumption does not apply in cases of this sort. These women have fought for their rights. Now they have got them and must suffer like men. It is just as well for women to know that, having demanded and obtained the rights of men, they are subject to the same penalties in the event of their transgressing the law. A year ago an offence of this nature was not a crime under the law, but the Legislature had now placed women in the same position as men, and they have to suffer accordingly.

Prisoner sentenced.

Solicitors for prisoner: *Chambers, Bruce and McNab.*

NORTHERN SUPREME COURT, TOWNSVILLE.

IN INSOLVENCY.

CHUBB, J.

18th January, 1892.

In re EDWARD YULE LOWRY, INSOLVENT.

Last examination by order of the Full Court.—*See ante* 115.

HIS HONOR said: Before proceeding with this examination I desire to say a few words in reference to the remarks of the Full Court when making the order for this examination. I do not wish to be misunderstood. I am not going to criticise the order in the smallest degree. I am bound by it, I accept it loyally, and intend to give

the fullest effect to it. Under ordinary circumstances I should receive it without comment, but as there is evidently a misapprehension in the minds of their Honors as to the position taken up by the Northern Judges in the matter, I feel it incumbent on me to remove it. The remarks I made when declining to act in the first instance could surely not have been brought to the notice of their Honors—if they were, then, either I made my meaning obscure or they were clearly misunderstood. In the first place, neither my brother Cooper nor myself had or expressed any doubt (as assumed and suggested by their Honors) as to our power to adjudicate on the order, if we had thought it proper under the circumstances to do so. We thought that the learned Chief Justice had not the power to make the order in that form. I took my stand solely upon the form of the order and upon the case of *In re Turnbull*, 2 Q.L.J. 181, cited to their Honors by the Solicitor-General, and upon another case, not cited, *In re a Commission from the Probate Division, England*, reported in the same volume, p. 187, which was a decision by the learned Chief Justice. The Northern Judges thought the order was (possibly *per incuriam*) mandatory in its terms (not intentionally discourteous), and that as the Northern Court was a distinct Court of Insolvency (in which opinion His Honor Mr. Justice Harding apparently concurs, see his judgment) and no request to it to exercise jurisdiction, as required by the section of *The Insolvency Act* read and commented on by His Honor Mr. Justice Harding, was contained in or accompanied the order, it was our duty, both upon principle and the authority of the cases mentioned, to refuse to give effect to it. The Full Court, however, has decided that we misread the order, and that it was not mandatory, but permissive; therefore, there is no more to be said about it, except this, that I presume, as their Honors have not said so expressly, that we must consider that the request to exercise jurisdiction is to be found in the order itself. I cannot, for the life of me, understand how their Honors, The Chief Justice and Mr. Justice Real, could have got into their

heads the idea that the Northern Judges imputed any discourtesy to The Chief Justice in the matter. Nothing was further from my thoughts, and I certainly never made any such charge, or intended it. I dealt with the question purely in the abstract, and if anything I said could have conveyed such an impression I am very sorry for it. I say this because I think that a judge who would refuse to exercise his judicial functions for such a reason would, in my opinion, have a very narrow conception of the dignity and responsibilities of his office, and therefore I cannot allow such an impression as regards myself to exist without contradicting it.

Report of J. B. Hall, Official Trustee in Insolvency, dated 29th December, 1891, was read.

Edward Yule Lowry, sworn and examined by Mr. Leu, swore to memorandum form 86.

Examination closed.

Solicitors for insolvent: *G. A. Roberts & Leu.*

CHUBB, J.

Feb. 10th and 24th, 1892.

In re DOBIE, INSOLVENT.

Ex parte TURNER, TRUSTEE.

Insolvent—Appropriation of salary to pay creditors—Insolvency Act (38 Vic. No. 5) s. 104, rr. 38, 155, ff. 65, 66.

THIS was an application by the trustee for an order under section 104 of *The Insolvency Act* for payment by the insolvent of part of his salary to the trustee for the creditors.

Macnaughton for the trustee.

It appeared that the insolvent had been served with the notice prescribed by rule 155, form 65, only.

HIS HONOR said that copies of the affidavits should have been served with the notice.

Macnaughton submitted that in this proceeding this was not necessary, because the insolvent's financial position was peculiarly within his own knowledge, and the affidavits would give him no more information than he already possessed upon that subject.

HIS HONOR referred to rule 38, and made an order calling upon the insolvent to show cause why an order should not be made for pay-

ment to the trustee of £15 a month from his salary, and directed copies of the affidavits to be served with the order.

This having been done, *Roberts*, for the insolvent, now showed cause.

It appeared from the affidavits that the insolvent was surgeon and physician to the third section of the Cairns-Herberton railway line, under a monthly engagement with the contractors. His salary was £80 a month, out of which he had to supply necessary medicines, &c.; that he had the right of private practice, which produced about £60 a year; that the supply of medicines, &c, for the line was about £100 a year, leaving a net income of £320 a year. Out of this the insolvent gave his brother—a student at King's College, London—£10 a month to assist him in maintaining himself there, and that he lived upon the remaining £200.

Roberts submitted that under these circumstances no order would be made.

HIS HONOR, without calling upon *McNaughton* to reply, said he would make an order which he thought, to use the words of the section, would be "just" upon the evidence. If the insolvent could manage to give his brother £120 a year, he did not require more than the remaining £200 to live upon. That being so, he thought that the creditors had a prior claim to the brother. It was no doubt a brotherly act to help the student in London, but insolvents must be just before being generous. The £10 a month must go to the creditors instead of to the brother.

Order accordingly for payment to the trustee by the insolvent out of his salary of £10 a month to be applied in payment of the creditors. Payments to commence on March 1st following, the trustee's costs of these proceedings (including counsel and solicitor, rule 99) to be allowed, taxed, and paid out of the first moneys received under the order.

Solicitors for trustee: *Daly and Beaumont.*

Agents for E. A. Milford, Cairns.

Solicitors for insolvent: *G. A. Roberts & Leu.*

Agents for E. D. Graham, Cairns.

NORTHERN SUPREME COURT, TOWNSVILLE.

CHUBB, J. 24th February, 1892.

HENDERSON, APPELLANT, F. MACDONALD, P.M.,
AND MCKIERNAN, RESPONDENTS.*Justices Act (50 Vic., No. 17), ss. 181, 182—**Summary jurisdiction—Receiving stolen goods**—Larceny Act of 1865, ss. 4, 96, 102.*In cases of receiving stolen property, the summary jurisdiction of justices is restricted to the specific cases covered by section 102 of *The Larceny Act*.

A summary conviction for receiving stolen shutters quashed.

THIS WAS a motion under section 209 of *The Justices Act of 1886*, to quash a conviction.

Jameson, for the appellant, moved the rule absolute.

Ross, for the respondent, J. G. Macdonald, P.M., showed cause.

McKiernan, the other respondent, showed cause against costs only.

The facts of the case were that on the 19th of January last two wooden shutters, the property of McKiernan, were found by a police constable, armed with a search warrant, upon the verandah of the appellant's dwelling. Appellant told the constable that he did not claim them, or know whose they were, that they were brought there by his son the afternoon before, while he was from home, and that on his return he saw them there. The shutters were last seen upon McKiernan's shop on the 16th, and were missed on the 18th January. The appellant's son, called for the defence, corroborated his father's statement and said that he found the shutters upon the bank of a creek about one hundred yards from the shop. Appellant's wife swore to the son bringing the shutters home. The appellant was charged with larceny and, electing to be tried summarily, was convicted of receiving the shutters and fined.

CHUBB, J.: The appellant was tried summarily by the Police Magistrate at Townsville under sections 181 and 182 of *The Justices Act of 1886*, for the larceny of two wooden shutters, under the value of 40s., the property of McKiernan, and was convicted by the Justice of feloniously

receiving them knowing them to have been stolen. The rule granted by me to show cause why the conviction should not be quashed contains two grounds, viz: (1) No evidence to support the conviction; (2) That this offence is not punishable on summary conviction. On the first ground I am against the appellant. The Justice was evidently not satisfied with the account given by him as to how he became possessed of the property, consequently the presumptive evidence of guilt arising from the recent possession of stolen property was not rebutted, and there was, therefore, some evidence, though slight, upon which he could convict. I do not think that upon that evidence I should have come to the same conclusion, but I cannot go so far as to say that the Justice was wrong. It is not enough to say that the evidence was weak or conflicting, or that this Court might have come to a different conclusion—the rule is that, as the Justices are the judges of the facts, their finding will not be reversed unless it clearly appears that they are wrong, or, to put it in other words, that there was no reasonable evidence to support the conviction. It cannot, therefore, be disturbed on this ground. On the second ground a question of the construction of the Statute is involved. The question is whether the offence of receiving stolen shutters can be dealt with summarily by Justices. Having regard to the provisions of sections 181 and 182, and to the offences there enumerated, one would, I think, expect to find the cognate offence of receiving stolen property amongst them, but a careful reading of them does not disclose any express mention of that offence. If, therefore, it is covered by the sections, it must, I think, be found, if anywhere, implied in sub-section 2 of section 181 as an offence "declared to be punishable as simple larceny." Now the offence of simple larceny is, by section 4 of *The Larceny Act of 1865*, punishable at the discretion of the Court by penal servitude for three years or imprisonment not exceeding two years with or without hard labor, &c., whereas the punishment for the offence of receiving is, by section 96 of the same Act, to

be at the like discretion penal servitude for any term not less than three or more than fourteen years, or similar imprisonment, &c., as in simple larceny. Here, therefore, it is patent, without more, that receiving is not "punishable as simple larceny," which words I understand to mean "liable to the same punishment." The counsel for the respondent, however, relies upon section 102 of the Act, which provides that where the stealing of property is by this Act (*Larceny Act*) punishable on summary conviction, the receiver of such property, knowing the same to be unlawfully come by (this expression is peculiar) shall be liable, on summary conviction before Justices, to the same punishment as the thief would be. Counsel for the respondent has failed to point out, and I have been unable to discover for myself, that the stealing of shutters is by this Act made punishable on summary conviction before Justices; if this is so, therefore the offence of receiving shutters cannot by virtue of section 102 be so punishable. There is a number of things specially named in the Act, the stealing of which is made punishable "as in the case of simple larceny," to which the provisions of section 102 apply, but shutters are not included in them—see for example sections 26, 32, 33, 36, 37. Then (apart altogether from *The Justices Act*) is there any other statute which makes the stealing and receiving of shutters punishable on summary conviction? I cannot find any, and the research of counsel has produced none. It appears to me, therefore, that the offence of receiving in this case is not within the summary jurisdiction of justices, and that the Police Magistrate was wrong in so dealing with it. The result is curious, because if he had convicted the appellant of stealing the shutters, the conviction would have been good under *The Justices Act*. In cases of receiving stolen property, the summary jurisdiction of justices is, therefore, in my opinion, restricted to the specific cases covered by section 102 of *The Larceny Act*, consequently this conviction must be set aside, but, under the circumstances, without costs. It may be, and probably is, a *casus omissus* on the part of the draftsman, as the addition of

the words, "or the offence of receiving stolen property the stealing of which would be simple larceny," at the end of subsection 2, of section 181, would have covered the point. A consequential amendment would, of course, be necessary in section 182. Order absolute to quash the conviction without costs.

Solicitor for appellant: *E. J. Forrest*.

Solicitor for respondent P.M.: *C. Selwyn Smith*.
Northern Crown Solicitor.

CIVIL COURT.

HARDING, J.

19th February, 1892.

STANFIELD v. GROOM AND ANOTHER.

Marriage Settlement—Mistake—Rectification.

The female plaintiff directed one R. G. W. to have a marriage settlement prepared enabling her "to do what she liked with her property." R. G. W. gave instructions for the preparation of settlement, giving her a life interest in the rents and profits, and enabling her to occupy the said land. Such settlement was duly executed by the female plaintiff and her husband, the male plaintiff, under the mistaken belief that it contained a power for the female plaintiff to do as she liked with her property.

Held, the settlement should be rectified to accord with the actual intention of the parties, and an order was made for the insertion of a trust to sell, mortgage, demise, and otherwise dispose and deal with the property.

Torre v. Torre, 1 Sm. and Giff. 518, followed.

ACTION for rectification of a marriage settlement.

The facts appear from the judgment.

Gore Jones for the plaintiffs; *Groom* for defendants.

HARDING, J.: This is an action by Mr. and Mrs. Stanfield against Messrs. Groom and Wonderley, trustees of the settlement executed on their marriage, for its rectification, under the following circumstances. At the time when Mrs. Stanfield gave instructions for the settlement she was seized for an estate in fee simple of an allotment of land in Toowoomba. Her husband settled nothing. By the settlement dated the 17th of March, 1890, Mrs. Stanfield's land was conveyed to the defendants upon trust for her for life for her separate use, and thereafter upon trust for

her issue, and otherwise not necessary to be further referred to. The settlement contained powers to the trustees to sell with her consent and to invest the proceeds, and to pay the income to the persons who would have been entitled to the rents of the land if not sold.

The plaintiffs allege that they intended when they executed this settlement that the land should be so settled that Mrs. Stanfield should, during her marriage, be able to do what she liked with it; and the questions for my decision are—(1) Has it been shewn by proper evidence that such was actually the plaintiffs' intention? (2) Does the settlement correctly represent that intention? In other words, has there been a mistake? The second question must clearly be answered in the negative. The title to relief, then, depends upon the first question being answered in the affirmative.

In considering the first question, I have to be satisfied that the intention is proved by proper evidence. The Common Law Rule has established that parol evidence is not receivable to vary, add to, or subtract from a valid written instrument. But Equity grants relief on clear proof of mistake, notwithstanding that it is made out by parol evidence, and even though there is nothing in writing to which parol evidence can attach; but when the proof is by parol evidence without writing, it must be strong, irrefragable, of the highest nature—in short, the clearest possible proof.

The cases as to rectification of settlements are very numerous. As to the nature of the rectification effected, perhaps that of *Torre v. Torre*, 1 Sm. and Giff. 518, is the nearest to the point. There the complaint was that a married woman's power over her separate estate was controlled by her settlement contrary to her intention and expressed wish prior and down to the time when she contracted her marriage, and contrary to the representation made to her, on the faith of which she executed the deed. The settlement contained the usual clause against anticipation. It was proved that her wish was to reserve to herself the same power over her property which she then had, and the settlement was rectified.

The evidence went to show that in February, 1890, Mr. and Mrs. Stanfield were contemplating marriage, and that the defendant Wonderley, a clerk in the employ of Messrs. Hamilton and Hamilton, of Toowoomba, a friend of Mrs. Stanfield, spoke to her about making a settlement on her marriage; that she asked him if she could do what she liked with the property if a settlement was made, and that he said yes; and that it was arranged between them that he should write her a letter on the subject to shew to her husband, which he did. In this letter he wrote—"It is always prudent to provide at the proper time against misfortune, and to secure what will always be at any rate a living for a man and wife." She shewed the letter to her husband, saying she would have a settlement made so that she could do what she liked with the land, and asked him to reply to the letter if he was agreeable. Mr. Stanfield, on the 2nd of March, 1890, wrote to the defendant Wonderley that he concurred with his suggestion. The defendant Wonderley says she had a second conversation with him, and said—"I suppose I shall be able to do what I like with the property," and that he said, "Yes, you can; you'd better have it settled." Upon this defendant Wonderley instructed Messrs. Hamilton and Hamilton to have a draft made containing the usual clause in a marriage settlement. The draft was made and sent by defendant Wonderley to Mr. Stanfield on the 10th of March. In consequence of floods, it was only delivered to him on the 15th, the Saturday before the marriage took place on Monday, the 17th. He immediately took it to Hamilton's office in Brisbane without reading it, where he saw Mr. Fred. Hamilton, who knew nothing about it before. He told him he was going to be married on Monday, and that he would like the settlement executed before the marriage and to have it engrossed. Mr. F. Hamilton states that he then read the draft to Mr. Stanfield; but this he denies, though he admits that some alterations were made in it consequent on the interview. These appear to have referred to the insertion of a power to appoint two trustees,

and to the extension of the power of investment to properties in all the Australian colonies.

On the 17th of March, Stanfield called on Mr. F. Hamilton at about half-past ten a.m. Mr. F. Hamilton produced the settlement and read it. Stanfield says that Hamilton asked him what he wanted in it, and that he said "he wanted it made so that she would have complete control over her own property, and that in no way could his creditors come upon it." Hamilton went on reading it, and Stanfield said, "I don't understand all the legal phraseology; if what I said is contained in the settlement that will be sufficient;" and that Hamilton replied, "That's the whole purport of the deed." Hamilton denies making this reply, and says that Stanfield did not make the statement about his wife's control over the property, that he said nothing about it; but Mr. F. Hamilton says that he might have used those words at the end of the interview in reply to a remark of Mr. Stanfield. Stanfield executed the deed and left.

Mrs. Stanfield, who never saw the draft, arrived at Hamilton's office about twelve. He did not read the deed to her, but says he explained to her that it gave her a life interest first, and then afterwards was in favour of children, and went through the whole deed paragraph by paragraph. The settlement contains a power to sell, but Mr. Hamilton says he did not tell her if the land was sold she had no power to keep the proceeds for her own use, or that there was no power to convey the land by mortgaging. Mr. Hamilton says she gave him the impression that she knew all about the settlement before she came to him, and that she might have thought the deed only bound her as long as she chose. She says that she said to Hamilton—and he does not deny it—"that she supposed it was all right, as Mr. Wonderley understood what she wanted." She executed the deed and left, and the plaintiffs were married at 3.30 that afternoon.

Both the plaintiffs insist that they executed the settlement under this mistake.

Evidence was given that within two months of the marriage the plaintiffs were very badly in want of money, and that on applying to the

trustees to raise money on the property by mortgage, they for the first time discovered that the settlement was in the form in which it was executed, and was not in the form of their alleged intention. This evidence I have found it unnecessary to use further than for the purpose of shewing that the plaintiffs have not been guilty of *laches*.

As to Mrs Stanfield, on the whole I think that she relied on the defendant Wonderley and the instructions that she gave to him, and that Mr. F. Hamilton, not knowing of these instructions, did not make it clear to her that these instructions had not been followed.

With respect to Mr. Stanfield, he had agreed with Mrs Stanfield that a settlement of her property should be made, so that she should have absolute power over it. At his interview with Mr. Hamilton, Mr. Hamilton stated that Mr. Stanfield seemed to know all about it, and I consider that what he intended was the same as his wife, and that he did not know that the settlement differed from that.

From the above considerations it follows that the first question I raised must be answered in the affirmative. Under these circumstances there must be—

1. A declaration that the settlement is not conformable with the intention of the plaintiffs, or with the agreement between the parties prior to the marriage; that the land was to be so settled that she should be able to do what she liked with the property, notwithstanding the marriage.
2. That the settlement ought to have contained a trust to sell, mortgage, demise, and otherwise dispose and deal with the property upon the request of the female plaintiff in manner requested by her, and to pay to her the proceeds for her separate use.
3. Let the settlement be rectified in conformity with these declarations, and let a copy of this order be endorsed thereon.
4. Let the costs of all parties be taxed as between solicitor and client, and paid out of the trust estate.

Solicitor for plaintiffs: *Pritchard*.

Solicitors for defendants: *Hamilton & Hamilton*.

FEBRUARY SITTINGS OF THE FULL COURT.

BILBY v. HARTLEY AND OTHERS.

Criminal law—Intimidation—6 Geo. IV, c. 129, s. 3—Effect of 9 Geo. IV, c. 83—Excessive fine—Amendment—Justices Act (50 Vic., No. 17) ss. 173, 174, 214, 223, 225.

B was convicted on a charge of intimidation under 6 Geo. IV, c. 129, s. 3. Certain shearers, besides B, were endeavouring to raise subscriptions for the defence of some fellow labourers then committed to trial. B and another shearer, asked some free labourers to subscribe to the fund. They refused to do so. B then said "If you come here to dinner I'll chuck you out," and made use of very foul language. The free labourers were also told if they came into tea they would be very roughly handled. They considered their lives in danger, and complained to the manager of the station. The justices fined B £10 and £25 12s. 8d. for costs, in all £35 12s. 8d., or in default three months' imprisonment with hard labour. *Held*, that the language used amounted to intimidation; that the fine was excessive under section 173 of *The Justices Act*, in as much as the defendant would be liable to imprisonment for six months under section 174 of that Act, while the greatest term of imprisonment under 6 Geo. IV, c. 129, was three months, and that the fine must be reduced to £4 19s. 11½d., and the conviction be upheld.

6 Geo. IV, c. 129, is applicable to Queensland. The effect of 9 Geo. IV, c. 83, discussed.

MOTION for a rule absolute quashing the conviction of Frederick Bilby, a shearer, before Messrs. W. J. Hartley, P.M., and P. J. Phillips, J.P., at Blackall, 22nd of September last, on a charge of intimidation, on the grounds that the justices had no power or authority (1) to impose or order payment of a fine; (2) to impose or order payment of a fine with alternative imprisonment; (3) to order the payment of the sum of 7s. 8d. for costs; (4) to order the payment of the sum of £15 15s. costs of witnesses' travelling expenses; (5) to order payment of the fine of £10 10s.; (6) to impose the penalty and imprisonment ordered; (7) that the statute 6 George IV, c. 129, is not in force in the colony of Queensland; (8) that there was no evidence before the justices of intimidation under the lastmentioned statute.

Lilley, and *Conlan*, to move absolute the order nisi; *Sir S. W. Griffith*, Q.C., A.G., *Byrnes*, S.G., and *W. A. D. Bell*, for the Crown.

Lilley: The facts of the case are these: Prior to September 9th, 1890, certain persons were committed for trial at Rockhampton for cutting Ebor Creek Bridge. The shearers in the western parts of the colony, of whom Bilby was one, were raising subscriptions for the defence of the prisoners, and to get them witnesses and food during the time they awaited trial. This was being done at Terrick station, near Blackall, where Bilby was working. On the morning of September 9th he and Turbot asked certain free labourers at the breakfast table to subscribe. The evidence at the prosecution was as follows: Turbot said, "Do any of you fellows refuse to pay 6s. 10d. towards defraying the rations fund of the shearers awaiting trial at Rockhampton over the Ebor Creek affair." Allis said, "I refuse to pay," and so did Oakden and Riding. Turbot then went to his mates amongst the unionists, who refused to eat at the same table as the free labourers, and said, "Here's these men refuse to subscribe. I'll make one to chuck them out." Bilby went over to the three and said, "Do you refuse? All the rest have paid." Allis replied, "I refuse." Bilby said, "Then don't come here to dinner; if you do I'll chuck you out." At midday they all went to their dinner as usual, when Turbot produced a number of lists for the men to sign for the expenses of the witnesses. Turbot asked Allis to sign, and he refused. Turbot again said to his mates, "Here are three men who won't sign, I'll make one to chuck them out." Bilby said to Allis and Oakden, "If you come to tea you will be chucked out," and Turbot added, "I'll make one to chuck them out as fast as they come in." At tea time the three went for their tea, and found nothing had been left for them. Turbot said, "If any of you come in you will be ——— handled." Allis accordingly considered his life was in danger. He went over to Sutherland, the overseer, and had his tea with him. The next day Allis spoke to the manager, and he advised him to seek the protection of the law. The overseer also spoke to Bilby, who refused "to cook for the ——— scabs." Allis subsequently laid an information

against Bilby under section 3 of 6 *George IV*, c. 129. That section provided that every person who by violence, threats, or other means, intimidated another, should, on conviction, be sentenced to imprisonment, or be imprisoned for any time not exceeding three months, with hard labour. Under section 173 of *The Justices Act*, power was given to a magistrate to substitute a fine for imprisonment, to any amount not exceeding £25, provided the amount should not be such as would subject the offender, in default of the penalty, to any greater term of imprisonment than that to which he was liable under the Act authorising his imprisonment. In this case the period of imprisonment fixed by the section of *The Act of George IV* was three months. The justices, however, fined Bilby £10 and £25 12s. 8d. costs, or in all £35 12s. 8d., or in default three months' imprisonment with hard labour. Among the costs they included the expenses of Bilby's commitment (in the event of his not paying the fine), and of his conveyance from Blackall to the Rockhampton Gaol. Under section 174 of *The Justices Act* they had no power to inflict a fine of more than £5, because if they had imposed a greater fine they would have subjected the offender to a term of imprisonment exceeding the three months which he was liable to under *The Act of George IV*. [HARDING, J.: They only gave him three months.] That was so; but they made him run the risk of getting six months, because by imposing a fine of more than £5, they laid him open to imprisonment for six months. They also ordered him, in default, to pay the costs of his commitment and conveyance to Rockhampton Gaol. Those costs were an unascertained amount, and it would have been possible for Bilby's gaoler to have kept him in prison for an indefinite time, and to have made him pay an indefinite amount. [REAL, J.: They first impose a fine, and if he does not pay they make an order for his commitment, but before that is carried out, the amount he has to pay has to be specified in the warrant of commitment.] I object to all the findings of the justices, and

maintain that the statute of *George IV* did not apply, and that there was no evidence under it of intimidation.

Griffith, Q.C., A.G.: The Solicitor-General and myself are here because this case raises matters of great importance. It raises the question of whether a statute was in force in the colony which was supposed to be in force, and under which persons had been deprived of their liberty. If the statute was not in force, the sooner that was made clear the better. Certainly we are not in court to discuss a question of form in connection with this conviction. We are here on behalf of the Crown to assist the court to come to a conclusion on the matter, and not on behalf of the respondent. [HARDING, J.: If this conviction is bad in form, you may never get to the other question.] [THE CHIEF JUSTICE: I doubt very much whether you could amend the conviction under the statute in this case.] The rule raised a question of great importance, and we are here to meet it, but now there appears to be a technical defect on the face of the conviction. [HARDING, J.: All the sentences under this Act have expired a long time ago, and there cannot be any person suffering under it now.]

Lilley: The Rockhampton men were not sentenced under that Act, but under common law.

HARDING, J.: There was a great parade at first of this sort of thing, and I looked at *George IV*, but I did not use it in any shape or form. I always carefully avoid anything which may possibly burn my fingers.

THE CHIEF JUSTICE: If it turns out that *George IV* is touched upon by anyone, if necessary we will decide it; but we may never get to it.

The Attorney-General: On the question of amendment, provision was made in sections 213, 214, and 223 of *The Justices Act* to correct convictions and impose a proper penalty. Section 223 laid down that "when on a conviction there is some excess which may (consistently with the merits of the case) be corrected, the conviction shall be amended accordingly, and shall stand good for the remainder." The amount which the

justices had power to impose was not more than £5, and there was some doubt whether it must not be less than £5. Under the scale given in section 174 it must be less. [THE CHIEF JUSTICE: We are inclined to think that the amount ought to be reduced to £4 19s. 11½d. At present we relieve of the burden of the question of excess.] I do not pretend that there is no excess. [THE CHIEF JUSTICE: No, that is clear. The action of the justices would have exposed the man to six months' imprisonment instead of three. The fine is a most excessive one, and ought to be reduced to £4 19s. 11½d.] Then the main question is whether the statute is in force in the colony. I contend that the statute is in force. It had been suggested at one time that it applied only to the rules of practice in the Court. [THE CHIEF JUSTICE: It was suggested by Lord Chelmsford, but never seriously argued. It was not even an *obiter dictum*.] The administration of justice had gone on since that, and all the laws of England relating to property and to criminal matters, so far as they could be applied to the conditions of the colony, are in force here. Blackstone, in his definition of those statutes, said: "that so much of them remained in force as were applicable to the circumstances and conditions of the colony in which it was sought to apply them." 6 *George IV*, c. 129, is a statute applying to criminal offences; 9 *George IV*, c. 83, which repealed many Acts relating to workers, extended such statutes as were applicable to the condition and circumstances of the colony. [HARDING, J.: All the labour laws against labour were repealed, but not this one.] My contention is that 6 *George IV*, c. 129, being a law relating to the liberty of the subject, and for protection of the subject from violence to his body, and what was akin to intimidation in my mind, is one applicable to the conditions and circumstances of the colony. In the case of *Regina v. Druitt*, 10 Cox, C.C. 592, Lord Bramwell said "that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much

declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law—by the writ, as it was called—of *habeas corpus*, and supplemented by statute, to secure to every man his personal freedom, that he should not be put in prison without lawful cause, and that, if he was, he should be brought before a competent magistrate within a given time, and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and, therefore, we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves." And he laid it down as clear and undoubted law "that if two or more persons agreed that they would by such means co-operate together against that liberty they would be guilty of an indictable offence." That was the common law of the offence which had been re-enacted by 9 *George IV*, c. 83. If any serious argument is to be made that the language used is not intimidation, I refer to this case. The language used is stronger than any previously reported. No decent person could remain on the station and submit to it. [REAL, J.: If it were applied to me, and there were a great number there, I should provide myself with a pistol. I would rather pay the 6s. 10d. than have it applied to me.] Most men would prefer to pay 6s. 10d. rather than submit to such language. This was a criminal offence under 6 *George IV*, c. 129, and

re-enacted as such by *9 George IV*, c. 83. The former statute was equally applicable to New South Wales as to any other place. It was an Act for the liberty of the subject, and therefore, came within the words of the statute which brought such laws into force as were applicable to the circumstances and conditions of the colony. [THE CHIEF JUSTICE: I think the offence comes under the 3rd section of the Act, and would affect the mind of any reasonable being.] Under that section, it was held in *O'Neil v. Longman*, 4 B. & S., 376, that asking a man whether he intended to remain in a shop after the others had gone out on strike, and have his name circulated throughout England, was an offence. [THE CHIEF JUSTICE: Very likely. In the old days tradesmen had travelling cards allowing them to visit town after town until they gradually worked their way to London. Such a thing would seriously affect them. There is nothing either on the face of the statute or in the circumstances of the colony to make *6 George IV* exceptional.] No. It is an Act that applies to all trades for the protection of property, and therefore comes within the laws of the colony. On the merits the matter entirely fails.

Byrnes, S.G.: If the statute *9 George IV*, c. 83, came into force in New South Wales, and remained in force in that colony, it would of course have come into force here by virtue of *The Constitution Act*, section 33. In *Webb's Imperial Law and Statutes*, p. 4, a *dictum* of Blackstone is quoted. "Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries." [HARDING, J., referred to *Yeap Cheap Neo v. Ong Chang Neo*, L.R. 6, P.C. 381.] This was a statute designed to protect men from intimidation and violence, and it would be introduced into the colony with civilisation. [HARDING, J.: A considerable portion of criminal laws are statutory, and can be applied to the colonies. Those in reference to the king, for instance. If there

can be special statutes provided for the king, why not provide them for individuals?] That argument is unanswerable.

Lilley, in reply: To decide whether *6 George IV*, 129, was applicable to the colony, we must look at the state of New South Wales at the time it was passed. From the Acts quoted I will show that the condition of labour in that colony then was entirely different to what it was in England. At that time it was not competent in New South Wales for employers to engage apprentices until they passed an Act for that purpose. That Act happened to come into force only eight days before *9 George IV*, 13, was passed in England. The English statute was passed to remedy the previous laws which were found to be inapplicable to the state of affairs then existing amongst tradesmen. [HARDING, J.: Would not the same observations apply to the Magna Charta?] No. Magna Charta protected all England, without applying to any particular class. *6 George IV* was passed to deal with labourers only. By its preamble it could be seen it was specially intended for local purposes. In 1828 the majority of the workmen in New South Wales were convicts. [HARDING, J.: Surely you don't contend that when New South Wales was made free people could only come to the colony subject to convict laws?] Would this Act then relate to a combination amongst criminal classes? [HARDING, J.: No. When *9 George IV*, 83, was passed, it applied to free people.] *9 George IV*, No. 9, which was passed in New South Wales years after No. 6, was the first Act to deal with labourers in the colony. In the preamble it says: "Whereas as many Acts are not applicable to New South Wales." That shows what the people thought then. [REAL, J.: *9 George IV*, 9, deals with the relations of masters and servants, and not with labourers' relations amongst themselves. [THE CHIEF JUSTICE: Then that Act would not help us much.] *9 George IV*, No. 8, provides for employers engaging apprentices in New South Wales. If people brought the laws of England with them, what was the use of passing this Act?

[REAL, J.: You can hardly make out that the laws do not apply to the colony when the legislature states they shall apply.] It has been held that before you can say *9 George IV*, 83, applies, you must look at the circumstances of the colony. Otherwise, you cannot say that the Act is applicable. That is the ruling in the Penang case of *Ye Ap Cheeah Neo v. Ong Cheng Neo*, L.R. 6, P.C. 381. I contend that the circumstances of the colony were so entirely different at that time, that the old English Act could not apply. The first *Masters and Servants Act* in England was *9 George IV*, c. 9. [THE CHIEF JUSTICE: *The Masters and Servants Act* before that was the whip.] *9 George IV*, c. 83, also dealt with masters and servants, and absconders, besides dealing with servants against servants. The very necessity of passing an Act like *8 George IV*, shows that No. 9 did not deal with the colonies. In *Whicker v. Hume*, 129, 7 H.L., 124, it was held that the statutes of mortmain did not apply to the colony of Grenada, there being no special circumstances therein for such application; and it was also held that *9 George IV*, c. 83, had not local application, although the subsequent opinions on this point went the other way. Again *6 George IV*, c. 129, prescribed a remedy in certain courts which had not similar courts in New South Wales.

Sir S. W. Griffith: *9 George IV* empowers the colonies to establish courts of quarter session.

Lilley: But that was afterwards. [*Sir S. W. Griffith*: Courts of quarter sessions were authorised to be established in New South Wales by *4 George IV*, c. 96. [REAL, J.: It is quite clear that there were courts of quarter session in the colonies before *6 George IV*.] In another case, that of the *Attorney-General v. Stewart*, 2 Merivale, 143, mortmain statutes were held to apply entirely in England. I contend that *6 George IV*, c. 129, was specially passed for England, and at the time of *9 George IV*, c. 83, was never intended to apply, and did not apply to New South Wales. That is borne out by the Penang cases, where the judges held that the statutes particular to England did

not become part of the Penang laws, because the common law had been introduced into them.

[HARDING, J.: To show that *6 George IV*, c. 129, cannot be applicable to New South Wales, you have got to prove that only convicts were working there when the Act was passed. There were sailors going to that colony then. How about them?] *6 George IV* does not apply in any way to sailors. [THE CHIEF JUSTICE: I take it the position is this. *6 George IV*, c. 129, was passed for the condition of things existing in England at that time. The same condition of affairs was not existing when *9 George IV*, c. 83, was passed; but if the circumstances arose which made *9 George IV* applicable in New South Wales, it would be applicable for all time unless repealed.] I contend that *6 George IV* was passed purely for local circumstances. If those same circumstances now apply in Queensland, but did not apply at the passing of that Act, that Act cannot apply to them. [HARDING, J.: As I said before, the same observation would apply to Magna Charta.] If the Chief Justice's proposition is good, the mortmain laws in *Whicker v. Hume*, which were held not to apply to the particular circumstances of Grenada, would apply. [THE CHIEF JUSTICE: They could not apply here because there are no monasteries or any great establishments eating up the land. That evil went to the root of the English reformation. People, as the people, wanted to get hold of the land belonging to the monasteries. If general laws were passed in England, and the circumstances of the laws afterwards became applicable to the colonies, would not *9 George IV*, c. 83, also become applicable?] I submit not. [THE CHIEF JUSTICE: If I understand you aright, you contend that if the circumstances in New South Wales were not applicable to *9 George IV*, c. 83, when passed, they cannot be applicable now?] No. Several laws in Forsyth's Cases on Constitutional Law have been held not applicable to the colonies, amongst them even penal Acts. In *Astley v. Fisher*, 6 C.B., 572, Maule, J., held that *9 George IV*, c. 83, did not import into the colonies all English laws. If any laws but those

applicable to the colony at the time they were passed could be imported into our code, it would not be possible to know the law of the land. [THE CHIEF JUSTICE: That is the way with all laws. The law does not arise until the offence is committed.] Yes; but you know what the law is. If 6 *George IV*, c. 129, can now be revived and sprung upon us at a moment's notice, we are living in a very risky state of affairs, and the sooner the Court decides the point the better. With respect to intimidation, threats were used but they did not amount to intimidation. *Connor v. Kent, Gibson v. Lawson, Curran v. Treleven*, (1891), 2 Q.B., 545.

Conlan followed.

THE CHIEF JUSTICE: This is a rule calling upon the justices and Henry Allis, to show cause why an order should not be made directing that the conviction or order made by the justices and others at Blackall, in a certain complaint, in which one Allis was complainant, and Bilby was defendant, should not be quashed on the following grounds:— That the justices had no power or authority (1) to impose or order payment of a fine; (2) to impose or order payment of a fine with alternative imprisonment; (3) to order the payment of a sum of 7s. 8d. for costs; (4) to order the payment of the sum of £15 15s. costs of witnesses' travelling expenses; (5) to order payment of the fine of £10 10s.; (6) to impose the penalty and imprisonment ordered; (7) that the statute 6 *George IV*, c. 129, is not in force in the colony of Queensland; (8) that there was no evidence before the justices of intimidation under the lastmentioned statute. Well, upon the question of the various amounts, there is no doubt that it is conceded that the magistrates imposed an excessive fine, which might have exposed the defendant Bilby to excessive imprisonment; because if the statute under which the complaint was undoubtedly laid is in force in the colony, the term of imprisonment is limited to three months, whereas the fine imposed by the magistrates, if unpaid, would have subjected Bilby to six months' imprisonment; as it was, the magistrates kept the term of imprison-

ment within the term imposed by the statute 6 *George IV*, but there was undoubtedly an excess in the amount of the fine imposed. That being conceded, an application was made by the Attorney-General, under *The Justices Act*, for leave to reduce the excess so as to bring it within such an amount as would leave a possible or alternative punishment of only three months, and so, in fact, impose the magistrates' imposition of only three months' imprisonment. We see no reason why we should not concede that application, and reduce the penalty imposed by the justices to £4 19s. 11½d., which will then allow the order of the justices imposing three months' imprisonment to be upheld. Of course that includes everything—both penalty and costs—and reduce the whole to one sum of £4 19s. 11½d. That, as I said, would allow the order of the justices to be upheld, if on the remainder of the case we think the prosecution is sustainable. Assuming that the Act 6 *George IV*, c. 129, under which the prosecution was begun, continued, and finished—assuming that to be the law for the moment—I will first mention the question of the substantial merits of the case. The facts are too disgusting to be recited from the bench. The question of intimidation arises under the section 3 of 6 *George IV*. It is provided under this particular section— “that from and after the passing of this Act, if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman manufacturer, workman or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, or prevent or endeavour to prevent any journeyman manufacturer, workman, or other person not being hired or employed from hiring himself to, or accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing, or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations made to obtain an advance or to reduce the rate of wages, or

to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeyman workmen, or servants; every person so offering, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall or may be imprisoned and kept to hard labour, for any time not exceeding three calendar months."

I think, the information was that the threats or intimidation were used on account of Henry Allis the complainant not having contributed to a common fund. It appears that a common fund had been formed for the purpose of making a provision or in some way providing for the comfort of some men who had been committed on a criminal charge. We can hardly fail to see that these troubles arose out of the recent unhappy disturbances between labour and capital as they are repeatedly called. We sit here to take no part on either side, which ever way our sympathies may lie with one party or the other. It is not of course for us to make any display of sympathy, nor to be influenced by any in our determination on what is really presented to the Court as a dry question of law. Our duty is limited entirely to that. Which ever way our decision goes, it implies sympathy with neither one party nor the other in respect to their relations one to the other, as capital or as labour. I will deal with the questions arising out of the trial, on the supposition that this statute of *6 George IV*, c. 129, is in force in the colony. The trouble appears to have arisen in consequence of Allis not having contributed, or refusing in fact to contribute 6s. 10d. to a common fund—a fund which was really got up to give some help to men who are now in gaol on a criminal charge. Looking at the language on the depositions, which is much too foul to pass through the mouth even of the judge, whose position sometimes necessitates that he

should recite such language, I think it is not necessary for me to recite it now. There is one part sufficient, without touching upon the fouler part, to sustain the charge (supposing the statute *6 George IV* to be in force) that is: that the man was threatened if he did not contribute this sum of money he would be "chucked" out. We know very well that that means he would be thrown out and possibly injured if he did not submit to this dictation. Well, I think, that would be quite sufficient in itself to inspire in a man of reasonable strength of mind some degree of fear or discomfort, or a sense of an attempt being made to coerce him to do that against which his mind or his reason might rebel. I think it is perfectly clear that, upon the facts of the case, there was sufficient material to justify the magistrate in coming to the conclusion that intimidation had been given. That being so, on the merits, the rule would have to be dismissed, but there is a further question of importance in the case, and I need not perhaps, hesitate to say, that a very great deal of clamour has been raised with regard to the character of the Act under which this prosecution was begun and ended. This is the Act *6 George IV*, c. 129. Of course, if that Act is not in force in the colony the whole prosecution had no foundation, and the rule would have to be made absolute. Without going into the earlier Acts applicable to New South Wales, which, I think, it would be quite unnecessary for my part to go into, I think it depends—the operation of the question whether this Act is in force in this colony depends—upon two things. First, what is the meaning of *9 George IV*, c. 83? What law did it import into this colony, and is there anything in *6 George IV* that is repugnant to the existing state of circumstances in the colony, or was so when *9 George IV* was passed, that it was impossible to show that the legislature could contemplate the importation of *6 George IV* into the law of New South Wales? *9 George IV* provides—

"Provided also, and be it further enacted, that all laws and statutes in force within the realm of England at the

time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent, or order in council which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively, as far as the same can be applied within the said colonies."

and so on. Now, many years ago, a very eminent Lord Chancellor hinted that the words "applied to the administration of justice," might possibly allude to the application of this statute to the practise of the Courts, but would merely import into New South Wales the practise of the English Courts. Well, my understanding—and I speak with deference in criticising so eminent a judge—my understanding of the words "administration of justice," implies that not only the practice of the law, but the substantive law, and the practice is intended to apply. I think, therefore, that these words imported not merely the practice of the Courts, but the actual substantive law of England, so far as it applied to the circumstances of the colony. That means, to my mind, that if the circumstances of the colony are such, or the circumstances of a particular case are such that the law cannot be applied, it obviously should not be applied. In that case, the law of England—the substantive as well as the practical law—would cease to have any effect with respect to the particular case within the colony. At all events, whatever the circumstances of the colony might be at the time of the passing of *9 George IV*, if the Act *6 George IV* is not inconsistent with those circumstances, and if it could be applied, then probably it must be applied in the administration of justice. I am inclined to think myself, and probably it is important in connection with this case, that although the circumstances existing at the passing of *9 George IV* might not make *6 George IV* applicable, or it might be inapplicable to the existing circumstances, still, if in the progress of life and society circumstances so altered within the colony that it would apply, or it might be applicable, then, I think, it would have to be applied, because there are many things which legislatures do not legislate for immediately. They legislate not only for immediately existing

evils, but for prospective evils that are likely to arise. Now there is one of the statutes which have been referred to, which uses the words "to prevent certain misconstructions." If these misconstructions did not exist in the colony of New South Wales after the passing of that Act, and have not arisen, the Act would of course apply. In fact, a statute is passed to-day, but it speaks for all time until the legislature sees fit to repeal it, change it, or modify it. A statute is not passed for a day; it is passed for all time until the legislature sees fit in its wisdom or in its folly, to repeal it, to modify it, or to re-enact something else in its place. So long as it is in the Statute Book, if the circumstances to which it might apply or ought to apply arises, it is our duty, sitting as a Court here, to apply it. I think the question then is: Is there anything in *6 George IV* so absolutely inconsistent with the circumstances existing at the present time, that its provisions cannot be applied in the administration of justice? On the face of it, looking at this Act—which seems to have repealed all the existing Acts affecting labour combinations, and to have passed one general statute—I may say that I cannot resist the conclusion that, at all events, in respect to this particular offence, there is nothing in the statute inconsistent with its application in this colony. On the contrary, it seems to me to apply to the circumstances of this particular case. I may say in dealing with statutes brought into force by the operation of *9 George IV*, c. 83. some portion of the statute may not apply, and some other portion may apply. Time or change of circumstances may sweep away the operation of a part of the statute, or time may bring into operation other parts, or may retain other portions of the statute in force, notwithstanding the lapse of time. Therefore, I am not prepared to say that the statute obviously is not intended to apply to the colony. The mere fact that you can pick out from the centre some few words which would have laid the foundation for prosecutions of this sort, would probably not be sufficient to justify them, but looking at the whole thing there is

nothing in this Act, in its object, or in its character, that is in any way inconsistent with the application of some portion of it, whilst in regard to other portions, one might disregard its application. There is nothing on the face of it, that I can see, that would make 6 *George IV* inapplicable. Therefore, by the operation of 9 *George IV*, c. 83, I think it has been brought into force in the colony, and it remains in force, and that the prosecution was well founded. I think, therefore, there ought to be reduction with regard to the money, reduction of the excess, and the conviction ought to be upheld. On the two questions whether the substantive offence was proved, and whether that offence was against the law of the colony, I think they are settled by the operation of these two statutes here. With regard to the question of excess, I think the complainant ought to have his costs. It is quite clear he was compelled to come here, and that on the other part of the case the Crown ought to have their costs; so that there will be two sets of costs.

HARDING, J.: I agree in great part with the judgment of The Chief Justice, but I defer expressing my opinion as to the application of English law to this matter. I think the statute 9 *George IV*, passed a mass of laws for New South Wales, which were to be extracted from the larger mass of the laws of Great Britain and Ireland, so far as they were applicable to the colony. Secondly, I think that the laws that could be taken out from the Statute Book and the Common Law at the time of the passing of that Act, are and were at once, and have ever since been the law of New South Wales. I don't think that if any part of the statute law of England was not at that time brought in by 9 *George IV*, and at once became applicable if the cause arose, that it, so to speak, lay dormant and became law at a future time. I would put it this way: that by 9 *George IV* all English law applicable to the colony at once attached, and although the occasion for the use of it might not arise for ten years, twenty years, or fifty years, still it was there as the sanction for the conduct of the people thereafter. I

consider that the moment 9 *George IV* was passed it became part of the law, and has ever since remained law as a sanction for the good conduct of the people. The rule must be discharged in the terms mentioned by The Chief Justice.

REAL, J.: I have nothing to add to the judgment of The Chief Justice. I desire to offer no opinion on the question raised by His Honor, because I have not sufficiently considered it. To my view the circumstances of the colony at the time of the passing of 9 *George IV* was clearly such as would render 6 *George IV* capable of being applied. Consequently, the effect of the statute 9 *George IV*, would be such as to apply that law. It was not sufficiently argued, and I have not sufficiently considered it to offer any opinion on the point thrown out by The Chief Justice as to whether, if the circumstances of the colony had been such that 6 *George IV* was not applicable at the year of the passing of 9 *George IV*, an alteration in them made it applicable, and we could hold it to be applicable. It was not necessary to consider that question in this case, and it has not been argued, and I have not considered it sufficient to express an opinion. In every other respect I concur in the opinions expressed in the judgment of The Chief Justice.

LILLEY, C.J.: The excess is to be reduced with costs. The rest of the rule is to be discharged without costs. I agree that there was not sufficient time to consider the point I raised. With regard to that it is a very fine point, and my opinion, no doubt on that, will be taken as academical.

Solicitor for appellants: *A. J. Thynne.*

Solicitor for respondents: *Crown Solicitor.*

NEIGHBOUR v. MOORE AND ANOTHER.

Masters and Servants Act of 1861 (25 Vic., No. 11), ss. 3, 20—Agreement—Absenting from hired service—Reasonable cause.

Before a servant can be convicted of absenting himself from his service, or refusing to carry out his agreement under *The Masters and Servants Act*, it must be proved that he had no reasonable cause or lawful ex-

cuse for such absence or refusal, and that he *bona fide* believed he had no lawful excuse.

Held, reserving the decision of the justices, that there was, under the circumstances, reasonable cause for the refusal to work.

MOTION to make absolute an order calling upon Richard Albert Moore, Police Magistrate at Charleville, and Peleg Whitford Jackson, of Mount Morris Station, near Charleville, to show cause why the conviction of James Neighbour of a breach of a shearing agreement should not be quashed, on the grounds: (1) That there is no evidence to support the conviction. (2) That the evidence showed that the defendant had reasonable cause to refuse to fulfil his agreement, and that his refusal (if any) to perform the alleged agreement was under the *bona fide* belief that he had such reasonable cause. (3) That the order of the Police Magistrate upon the defendant to pay forthwith the sum of £6 16s. 6d., and in default of immediate payment, that the sum should be paid out of the sum of £20 13s. 11d., due to the defendant on account of wages by complainant, is bad in law. (4) That there is no evidence of any agreement within the meaning of *The Masters and Servants Act of 1861*, 25 Vic., No. 11.

Lilley and *Fitzgerald*, for appellants, to move the rule absolute. *Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Mansfield*, to show cause.

Lilley: The applicant was a shearer on a station called Mount Morris. He was charged, under section 8 of *The Masters and Servants Act*, with having absented himself from his work as a shearer without reasonable cause. In *Wilkinson's Queensland Magistrate*, p. 518, second edition, it is laid down that before a person can be so convicted of absenting himself, under section 3 of *The Masters and Servants Act*, the justices must be satisfied that he absented himself without lawful excuse, and that he knew he had not lawful excuse, and the cases referred to are *Rider v. Wood*, 29 L.J., M.C., 1; *Willett v. Boots*, 30 L.J., M.C., 6; *Youle v. Mappin*, 30 L.J., M.C., p. 234. The facts of the case are these. The applicant was engaged by the firm of Frauenfelder & Co., of

which the respondent Jackson was a member, on 1st October, 1891. After the agreement was signed, the scale of rations was read out. Exception was taken to no provision having been made for mutton, and this was explained as due to the fact that there were no old wethers on the station. Objection was taken to the price charged for the beef, which was 2½d. a pound, and after some trouble Mr. Jackson told the men that if things went on all right he would probably reduce the price by ½d. Under the agreement Neighbour and his fellow-shearers undertook to shear during the season, and do their work in a workmanlike manner to the satisfaction of the employers or their agent, the total amount of sheep to be shorn to be not less than 80,000 sheep, nor more than 90,000, and the price being 20s. per hundred. All the dispute arose about the meat. The men were supplied with beef instead of mutton, and on 29th October there was a complaint about the quality. They were then paying 2½d. per lb. for beef to the squatters. The cook informed the overseer, Russell Dunn, that if the meat continued to be as bad as it was, it would cause a disturbance among the men. After that the meat was changed, and mutton was supplied instead. On 11th November a bullock was killed and sent down to the shearers' mess. They looked at it, and determined that it was bad, and, deciding not to have it, they sent it back. Neighbour went to Dunn and told him that the meat was uneatable, and asked him to substitute sheep for it. Dunn thereupon delivered to him four sheep—two were killed for the evening meal of the men, and the remainder left for the next day. Before dinner time the two remaining sheep were taken away by the orders of Mr. Jackson, and the rejected beef was returned. Neighbour went to Dunn and asked him what they were to do for meat, and was told that his (Dunn's) instructions were that they were to get no more sheep, and if they would not use the beef there was nothing better for them. Neighbour said the men would not go on shearing unless they got better meat. Subsequently Mr. Jackson came down and asked each man if he was

going to shear. They all declared the meat was unfit to eat, and refused to go on with their work unless they were given proper meat. Thereupon Mr. Jackson said he would go to Charleville and summon them for having broken their agreement. While he was away another shearer asked if they could get rations, and was told "You can get anything but money on the station by paying for it." But subsequently the shearers were refused rations until Mr. Jackson returned from Charleville. The men being unable to get either meat or rations, subsequently left the station. [REAL, J.: By their agreement they were to be supplied with rations at 10 per cent. on cost price with the cost of carriage added.] By rule 8 of the agreement, the price to be charged for rations was not to exceed 10 per cent. on the cost price with carriage added. The men swore they conscientiously believed the meat to be bad, and there was abundant evidence to show that they had reasonable cause for acting as they did. The magistrates convicted Neighbour, and ordered him to pay £6 12s. 6d., which, in default, was to be taken out of the £20 13s. 11d. due to him for wages. The agreement was that he was to shear, with all reasonable despatch, all the sheep required by the employer in a workmanlike manner. The total number to be shorn by the whole of the shearers during the season was to be not less than 80,000 nor more than 90,000. There was nothing definite in that—both the time and the number were indefinite—and there was nothing to show that the season had not expired on the 12th November.

Griffith, Q.C., A.G.: The first objection made to the conviction is: that there is no evidence to support it. The defence set up was that the defendant had reasonable cause to absent himself from his work, and the reasonable cause was that the meat given him was not good enough. [REAL, J.: And there were no means of getting any other.] Admitting that there was a contemporaneous agreement that they should be supplied with food, the complaint was as to the quality of a particular bullock. On that the evidence was

very conflicting, and while on one side the meat was declared to have been bad, it was said on the other to have been good. [REAL, J.: Supposing it was the best in the world they had rejected, could not they say, "We don't like it; we prefer our two sheep"? Can the employer come and take their mutton, and say "you must eat this meat or none, and you must work"?] They did not say that. [REAL, J.: They did say that, and they took back the sheep.] No such point as that was made. It is a nice point made now, but it was never suggested before. [REAL, J.: They had taken their two sheep. The men asked for sheep, and they were told "you will not get sheep."] As to that the facts are these: The manager had stipulated with the men that they were to get beef—[THE CHIEF JUSTICE: "Which is to be good."—and not sheep. The overseer, the third in command, handed them four sheep without the manager's authority to do so. [REAL, J.: He was the man they had rendered their complaints to, and to whom they had applied for rations.] The main question in dispute was the quality of a particular bullock. Upon that there was conflicting evidence. The finding of the Court below was that the beef was good and the complaint was frivolous. The history of the dispute was that the beef which had been found by the Court below to have been good was sent to the men, and they said it was bad. In the absence of the manager they asked the overseer to give them some sheep, and he complied with their request. When the manager returned he found that this had been done, and ordered the sheep to be turned out and the beef returned to the men. As a matter of fact the returning of that beef had no more to do with their refusal to continue working than if they had been denied champagne, and the magistrates considered it to be merely a pretext for breaking the agreement. The next point rests upon the form of the conviction, and depends upon the construction of section 20 of *The Masters and Servants Act*. The objection was that the deduction of the fine from the wages could not be made immediately. If that is the

proper construction of the section it is an absurd one, and the section, if construed strictly grammatically, will not sustain the objection. As to whether the agreement is within the meaning of the Act, the agreement was that the men were to shear during the season all the sheep required, the number not to be less than 80,000 nor more than 90,000. The understanding of both was that, at the time of this occurrence, there was more work to be done under the agreement, and there was evidence that the agreement was still unfulfilled. The real objection was that the agreement was too indefinite to be an agreement for time and piece-work. The term season is as definite as all the sheep on that station. [REAL, J.: To my mind, the only thing that made it definite was the combination of the maximum, minimum, and the season. It is to terminate at the end of the season, or when the maximum is reached; not terminate during the season until the minimum is reached.] During the season means the season's clip. [REAL, J.: The season means something connected with the sheep and not connected with the time during which they have to shear.] It means both. Season in this agreement means the time during which sheep were usually shorn in that part of the year. It appears the men had been working six weeks, and had not got to the minimum, and they were prepared to go on if this had not occurred. That went to show that the agreement so far had not expired.

Byrnes, S.G.: The conviction follows the wording of the statute, and contains every ingredient necessary to sustain it. The magistrates found all the facts necessary to make the conviction sustainable at law. The question was whether there was evidence on which the magistrates could come to the conclusion that the men refused to go to work. [REAL, J.: I do not see that they refused to work.] They were asked individually if they would resume work, and each of them distinctly said "No." [REAL, J.: They said they would not go to work at once unless they got good meat.] [LILLEY, C.J.: That is a critical part in the evidence, and I want you to go over it

deliberately. Jackson, in the absence of the men, ordered the sheep to be returned. Were they aware of that?] Their servant, the cook, was aware of it, and he had ample time to make other provision for the dinner of the men. It is submitted it must be taken the meat was good, and it was there for the men to take it, and if they refused, and alleged as a cause for breaking the agreement that it was bad, they wrongfully broke their agreement.

Lilley, in reply: The agreement might be the best possible under the circumstances, but was it one for the breach of which a man could be punished under *The Masters and Servants Act*? It might be impossible for a squatter to make a definite agreement. [REAL, J.: I don't see how it could be more definite. The agreement terminates at the end of the season, and the squatter is not bound to go on a day longer.] There is nothing in the agreement requiring him to start shearing. [REAL, J.: He has to start on the 1st October, and he has to keep the shearers fully supplied with sheep until the whole of them are shorn.] How many can you say that a man has to shear? [HARDING, J.: As many as he can.] No; I submit as many as the squatter likes to give the shearer. The agreement did not say how many the latter had to shear, and under the agreement the number was an ever varying one. The agreement is not sufficiently definite to be enforced under *The Masters and Servants Act*. [REAL, J.: The agreement seems reasonable enough.]

LILLEY, C.J.: The defendant James Neighbour has been convicted upon an information which alleges that, without reasonable cause, he refused to fulfil an agreement as a shearer on Mount Morris. Now the question is whether that conviction can be sustained. This is a penal proceeding, and that distinction must not be lost sight of. If the defendant did wilfully refuse to fulfil his agreement, he is liable to fine and imprisonment, and, therefore, we have to look at the case from the point of view that we would look at any other case of a criminal character, or of one bearing penal consequences. It has been

decided by the Courts in England, that before you can convict a man of refusing to carry out his agreement you must find that he refused to carry out his agreement without lawful excuse, and that he was aware that he had no lawful excuse—that is to say that he not only refused to carry out his agreement without reasonable cause, but that he was aware that he had no reasonable cause for such refusal. It is not an easy matter to decide a case of this kind coming up from the justices. The Courts in England, in construing the question of lawful excuse or reasonable cause, have followed the old maxim that ignorance of the law is no excuse—that is: that if a man is really mistaken on a question of law, and thought he had legal excuse or legal cause for absenting himself from his work or refusing to fulfil his agreement, and was mistaken in his view of the law, he would be liable to be punished; but if he was mistaken on a fact—if looking at the facts he *bonâ fide* believed that he had lawful excuse not founded on any error of law, then he would not be liable to penal consequences. It is by no means easy for a magistrate, and it is by no means easy for me to discern the fine line of distinction between ignorance of the law of the matter and ignorance of fact. However, it has been very fully thrashed out by Counsel on each side, and particularly by the Counsel in support of the magistrate's decision, and I think I see pretty clearly how this matter should be decided. I am desirous, at the outset, of saying that it is with great reluctance that I disturb the findings of a magistrate on a question of fact. If there were facts upon which a reasonable man might come to the determination reached by the justices, or by the jury, we would not disturb the verdict or the judgment of the justice; but we have not surrendered the right of the Court to review the reasonableness of the finding, and it would not be a safe thing for the public if the Court should ever come to the conclusion that, so long as there were facts before the magistrate, his decision—reasonable or unreasonable, or whatever it may be—is to stand. We have reviewed and shall continue to review the

question of magistrates' decisions upon the point of reasonableness. I have not the slightest doubt that the decision of the magistrate here was come to in perfect honesty of intention. There is nothing in the world to show that he did not take the utmost pains to be right, and it appears that he delivered a most elaborate judgment. I have not read it, nor has it been read in Court, but I think it due to him to say that he acted with perfect honesty of intention. I think it incumbent upon me to say that, because I have come, with some doubt and difficulty, to a conclusion directly opposed to that of the justices. The facts appear to me to furnish (looking at this as a penal proceeding), in the first place, proof that these men had reasonable cause for abstaining from work to the extent that they did on the first day. The facts, so far as they touch that particular time, are these: It appears that there was this agreement, and there is no doubt that the master is bound under that to find the men rations—such rations as men of their class and pursuit are entitled to. He was bound to furnish rations on being paid for them; I think that is the reasonable construction of the agreement. It appears that the men could not get rations unless they got them on the station, without travelling a day and a half, or at all events more than a day, to procure them. It appears that the master agreed to furnish them with such things as they required—the men requiring meat and drink, and ordinary necessities; and no doubt the reasonable construction of the agreement is, that the master was bound to find them rations—such rations as they might require. It appears that they required meat. It was clear that it was in the minds of both parties that meat should be furnished when required. In the first place the men wanted mutton, but ultimately were agreeable to take beef. First they had mutton and then they consented to take beef instead. Then they were given mutton for five days. On the particular day when the first breach of agreement is said to have occurred, they had in their possession in the early morning, in their control, or in the control

of the cook who was their servant, two sheep. Now it appears to me that Dunn, the overseer, had authority to give the sheep at the time he gave them. They (the men) knew, so far as I can see, that there was no reasonable cause to believe that that authority had been cancelled. That being so, I think they had good reason to dispute the authority of the master to cancel—this is a penal proceeding I am speaking of—the authority which he had given, either express or implied, to Dunn to supply these sheep. Now on that morning these sheep were taken away—driven out. Consequently they were not there ready for dinner. I think the men had reasonable cause to complain of that. When the men come to dinner—or rather to get dinner—and there is no dinner for them, and they are told that the sheep have been driven out by the authority of the master, I think they have reasonable cause to complain. Whether they could be held responsible for the knowledge through the cook, who seems to have been their servant, is doubtful. I think they could not be held responsible in a penal proceeding of this character. At all events, they might say very well that they did not know. Then they had an offer of beef and rejected it. Was it a reasonable thing that men having an offer of this kind should be told, at the caprice of the master, “You must eat beef to-day, although we have given you mutton, or you can have nothing else.” I think it was not a reasonable thing, and I think the men had very fair excuse for doing what they did. What did they? They did not absolutely refuse to comply with the agreement. What they did was to say “we are not going to work without meat,” and I think they had a right to say at that point “we are not going to work without the mutton which we expected to get.” How long it would have taken to get beef from the butcher’s shop I do not know. On that point it appears to have been asserted that they were bound to wait a reasonable time. If they had that fair excuse which I have spoken of, as I think they had, what they did was to say “we are not going to work if the mutton is not

supplied to us,” and they did not go out to work that afternoon. I cannot, if that was the period of time to which the information was directed, see that there was any ground for saying that the men knew that they had not reasonable cause, or that it could be said otherwise than that they knew that they had reasonable cause. At all events, I think there is nothing up to that time to bring them within the penal consequences of the section. There does not appear to have been even on the next day any absolute refusal to fulfil the agreement. They (the men) come up on the next day and they ask for rations. There is nothing to show that they were unwilling to work or that they refused to work. The master said “you shall neither have rations nor anything else,” and Neighbour’s evidence on this point is as follows:—“On next morning, the 13th November, I went to the station. I then saw Mr. Marshall; I said “what about rations?” Marshall said “you will get none since you have broken the agreement.” I said “we were thinking of waiting till Mr. Jackson comes out from Charleville.” I said to him “give me 50 per cent. of what I have earned.” Marshall replied “you will neither get money nor rations since you have broken the agreement.” I said “there is a difference of opinion about that; we think you broke it.” Marshall said “we will settle that in the Charleville Police Court.” So that there was a determination on the part of the master to test the matter by law with the men. After that I cannot say that they can be said to have refused to complete their agreement. They were standing on the proceedings of the previous day. He (the master) said “you broke the agreement,” and they said he broke it. There was a clear difference of opinion on the facts as to the cause, and as to whether the act of the master or the act of the men on the preceding day amounted to a breach of the agreement. I can see no reason for not believing that the men believed they were lawfully excused when they refused to work. That being so, I think the rule must be made absolute, with costs, on the second ground.

HARDING, J., and REAL, J., concurred.

Rule absolute accordingly, with costs.

Solicitor for appellant: *A. J. Thynne*.

Solicitors for respondents: *Bernays & Osborne*.

QUEENSLAND NATIONAL ASSOCIATION v. BOOROODABIN DIVISIONAL BOARD.

Valuation and Rating Act of 1890 (54 Vic., No. 24) s. 11, sub. 2—Land used for public purposes—54 Vic., No. 13, s. 3.

In order to exempt lands used for public purposes from rating, it must be proved that the lands are used exclusively for public purposes. The exclusive user, essential to exemption, excludes anything which is not for the sole benefit of the public. The lands of the Acclimatisation Society and National Association are liable to rating inasmuch as they are let for pecuniary benefit.

Mayor of Essendon v. Blackwood, 2 Ap. Ca., 574, followed.

APPEAL, by way of special case, from a decision of the justices holding the lands of the National Association liable to be rated.

Power, for the trustees of the Association.

Byrnes, S.G., and *Lilley*, for the Board.

The facts and arguments appear from the judgment.

THE CHIEF JUSTICE: This is an appeal from a decision rendering the National Association liable for rates. The lands of the Association are vested in the trustees, under the 3rd section of *The Acclimatisation Society and National Association Act of 1890* and they are vested upon trust for the appropriation thereof, to the use of and for the grounds of the Association, and for no other purpose whatsoever. By section 11 of *The Valuation and Rating Act of 1890*, "all land is rateable for the purposes of this Act," with the following exceptions:—that is to say, land in the occupation of the Crown or of any person or corporation which is used for public purposes, including land vested in trustees for agricultural or pastoral societies for the purposes of a show ground. It does not appear to me to matter how it is vested precisely, so long as it is land that is used for public purposes. It is the user that seems to entitle the Association to exemption, and

under the case of the *Mayor of Essendon v. Blackwood*, 2 Ap. Ca., 574, it must be the exclusive use to entitle the Society to exemption. So it is user and exclusive user that entitles the Association to exemption. But they must show that they made exclusive use of it for public purposes. We are bound by the authority of the *Mayor of Essendon v. Blackwood*, which seems to be a case which commends itself to our reason. It certainly struck me, before that case was cited, that the words of the section must be used exclusively, because a person might get a valuable grant of land, use a small or inconsiderable part of it for public purposes, and apply the balance to all sorts of uses for other purposes. In this case the lands were used for other than public purposes, inasmuch as the hall was let for concerts, and the grounds for cricket matches. Though it was stated that the funds raised thereby were applied for the improvement of the property of the Association, it was not compulsory on them to do that. In the by-laws of the Association there were other purposes mentioned which were certainly not solely for the benefit of the general public. Even in the payments made by members, entitling them to admission to the annual show, there was some benefit to individuals. The exclusive user, which was essential to exemption, excluded anything which was not for the sole benefit of the public. That being so, the magistrates were right, and rating must be upheld. The lands were not exempt from rating, and the appeal must be dismissed with costs.

HARDING, J., and REAL, J., concurred.

Solicitor for trustees: *G. V. Hellicar*.

Solicitors for the Board: *Chambers, Bruce & McNab*.

BURREY v. MARINE BOARD OF QUEENSLAND.

Prohibition—Marine Board Inquiry—Navigation Act of 1876 (41 Vic., No. 3) ss. 37, sub. 3, 38, 39, sub. 3—Suspension of certificate—Mode of inquiry.

A Marine Board inquiry was held into a collision between the steamers "Eurimbla" and "Lismore." After

the inquiry the Secretary of the Board wrote to B, third mate of the "Eurimbla," stating that the Board found he was in default, and called upon him to shew cause why his certificate should not be suspended. B received, along with the letter from the Secretary, a statement of the case upon which the inquiry had been ordered. At the second inquiry, at which B attended to shew cause, the Board acted on the evidence given at the first inquiry, and B had no opportunity of cross-examining the witnesses. B's certificate was then suspended by the Board.

Held, that B had not had a full opportunity of making his defence, and that a rule *nisi* for a prohibition should be made absolute, with costs, against the Board.

MOTION to make absolute a rule *nisi* for a prohibition against the Marine Board of Queensland, from proceeding or further proceeding, upon or in respect of a decision made by the Board on 18th December last, by which they suspended the certificate of Arthur Inglis Burrey, third officer of the steamer "Eurimbla," for default in connection with the collision between the "Eurimbla" and the schooner "Lismore," on 1st November last, on the grounds: (1) that the Board did not furnish him with a report or statement of the case previous to the inquiry into his conduct; (2) that he had not a full opportunity of making his defence; (3) that there was no evidence to support the order or decision of the Board; (4) that the Board, as constituted at the inquiry, had no jurisdiction to suspend the certificate. The collision took place off the Clarence Heads at night, when the appellant was on watch, and the "Lismore" was sunk. On the 3rd November, shortly after the arrival of the "Eurimbla" at Brisbane, an inquiry was begun by the Marine Board into the collision, and the appellant among others was present as a witness. The inquiry was continued up to 25th November, when it was closed, and the Board reserved their decision. Subsequently they intimated to the appellant that they found him in default, and called upon him to shew cause why his certificate should not be dealt with. The appellant appeared, and the result was the decision of the Board now called in question. He complained that the intimation given to him did not contain a statement of the

case against which he had to defend himself, and he was therefore denied the opportunity of making his defence and cross-examining the witnesses. The first inquiry held was as to the collision, and appellant did not understand that his conduct was involved in it. At the second inquiry (when he appeared to shew cause) the Board acted on the evidence given at the previous investigation.

Lilley and *MacDonnell*, for appellant, moved the rule absolute.

Byrnes, S.G., and *Wilson*, for the Board, opposed.

Lilley referred to *Navigation Act of 1876*, ss. 5, 7, 10, 37, sub. 2 & 3, 38, 39; and *Hummel's Case*, 3 Q.L.J., 50; *Markey v. Murray*, 2 Q.L.J., 7.

Byrnes, S.G.: The examination was held under s. 37, s. 3. The appellant received sufficient notice. He must necessarily have known the object of the inquiry.

Wilson followed, and referred to *Murton's Wreck Inquiries*, 36, 86, 91, 107, 173; *Ex parte Ferguson*, L.R. 6, Q.B. 280.

Lilley: Proceedings should have been commenced *de novo*. *Murton*, p. 108.

HARDING, J.: This is a motion for a prohibition against the Marine Board by one Burrey, whose certificate was suspended by the Marine Board at an inquiry or investigation which took place or was held under the 37th section of *The Navigation Act*. In every judicial proceeding, where a man's conduct was called into question, he must be first of all charged—he must be told why he was brought there, and against what he had to defend himself. Having been properly charged, then the charging party had, by judicial evidence, to make out the case against him. That was to say, according to our law, there must be sworn testimony given in the presence of the accused, with the opportunity afforded him to cross-examine witnesses immediately after they had given their testimony. Then, and then only, if the case was made out against him, was he called upon to defend himself, and he defended himself by calling evidence of a similar kind. The question then arose whether or no he had rebutted the charge. *The Navigation*

Act provides a tribunal for investigating certain things, and section 37, subsections 1-3, provides for three separate proceedings. The first is separate from the second, and the second from the third; and the second and third are separate from each other, and from the first. The first and second refer to the limits within which the Board can hold inquiries; and the third gives power to investigate complaints as to the incompetency or misconduct of a master, mate, or engineer. There are two subjects of inquiry, and it is material to bear in mind that there were two separate subjects of inquiry. One subject could not be run into the other if each formed the subject of an investigation properly commenced. If only one of these inquiries was commenced, then it could not be run into the other inquiry, and *vice versa*. If the Board wanted to make the two inquiries together, they must commence them together. If a judicial investigation was being held under the third subsection, the person charged must, by the laws of investigation, have notice of the charge, evidence must be given before him, and he must have an opportunity of cross-examining witnesses until the end of the proceeding. This was placed beyond doubt by the 3rd subsection of section 39, which stated:—"No certificate shall be cancelled or suspended unless a report or a statement of the case upon which the investigation is to be held has been furnished to the owner of the certificate before the commencement of the investigation." Therefore the report or statement of the case—that was to say, what was called in that Court the information—had to be delivered to the party charged before the commencement of the investigation. This was an investigation under the 3rd subsection of section 37, and that was not the same as an investigation under the 2nd subsection, unless the latter was commenced at the same time. The question was, was Burrey properly charged, and had he the opportunity of cross-examining the witness? All he had was a letter, under the signature of the secretary of the Marine Board, stating that they had held an

inquiry into the matter of the collision, and having found that he was in default, called upon him to show cause why his certificate should not be dealt with. That was a document dated 3rd November, 1891, a month all but three days before he was called upon to show cause. With it was what was called a statement of the case upon which the inquiry had been ordered. So that they gave notice of the inquiry which had been held under the 2nd subsection, intimated that a conclusion had been arrived at on that, and stated he was required to attend at an inquiry affecting his certificate, which I have ruled was under subsection 3. No report or statement of the case which he had to meet was given to him, and when asked whether it was intended to take the evidence *de novo*, the Chairman of the Board stated they intended to use the evidence taken in the inquiry into the collision between the "Eurimbla" and the "Lismore." Objection was taken that Burrey had not been given a report or statement of the case, and his solicitor was informed that he could recall witnesses. In the legal acceptance of the term that meant witnesses already examined in the particular inquiry; but, as this was a new inquiry, no witnesses had been examined. Consequently Burrey could not exercise the right of cross-examination. The only evidence called was of a character that did not show anything which would subject him to the finding of the Board. Consequently I think that the rule must be made absolute against the Board, with costs.

THE CHIEF JUSTICE and REAL, J., concurred.

Solicitors for appellant: *Unmack & Fox*.

Solicitor for the Board: *J. H. Gill*, Crown Solicitor.

EASTERN MINERS' GOLD MINING COMPANY v.

SELLHEIM AND ANOTHER.

Prohibition—Small Debts Court—Set off—District Courts Act, 1891, s. 156—31 Vic., No. 29, s. 34.

The plaintiffs sued one Dugard in the Small Debts Court at Gympie, to recover £6 for calls due. The defend-

ant put in a set off for £20, alleged to be due to him for damages from the company. The magistrate, P. F. Sellheim, P.M., gave judgment for the defendant for £14, deducting the amount claimed by the plaintiffs from the set off. The plaintiffs appealed to the judge of the District Court, who dismissed the appeal. On an application to the Supreme Court for a writ of prohibition against the magistrate and Dugard, *Held*, that the rule could not be granted, as the plaintiffs had not exhausted all legal remedies; the appeal from a District Court by special case not having been tried.

Held, also, that the defendant's claim was not the proper subject of a set off, the claim being for unliquidated damages, and that the magistrate had no power to give judgment for the defendant for the excess. No costs allowed.

MOTION to make absolute a rule *nisi* for a writ of prohibition restraining P. F. Sellheim, P.M., and Henry Dugard, from further proceeding in an action brought by the Eastern Miners' Gold Mining Company against Dugard, to recover calls, on the grounds: (1) that the defendant's claim was not a proper subject for plea or set off; (2) that the magistrate had no jurisdiction to give judgment for the defendant for the amount of the set off in excess of the plaintiffs' claim. The plaintiffs sued for £6 due for calls, and the defendant, in defence, put in a set off of £20 which he alleged the company owed him. The magistrate gave judgment for the defendant for £14, being the amount of the set off less the amount of the plaintiffs' claim. The plaintiffs appealed to the District Court, on the ground that the magistrate had no jurisdiction to award an amount in excess of the plaintiffs' claim.

Drake, for the appellants, to move the rule absolute.

MacDonnell, for the respondent, to shew cause.

MacDonnell raised the preliminary objections (1) that, as the judgment of the District Court still stood, the writ should have been directed to the judge of that Court, and not to the magistrate; (2) that the plaintiffs had not exhausted all their remedies. The appeal from a decision of the District Court is by special case. The following authorities were referred to: *Great Freehold Mining Estate, Limited, v. Garde*, 4 Q.L.J., 9; *Rodda v. Allen*, 2 Q.L.J., 108; *District Courts*

Act of 1891, s. 156. A common law prohibition will not lie against a ministerial officer doing a ministerial act; *High's Legal Remedies*, 555. Prohibition does not lie against ministerial officer; *Ex parte Martin*, 1 N.S.W. R., L., 345; *Small Debts Act of 1867*, s. 34; *District Courts Act of 1891*, s. 156; *District Court Act, 1867, Amendment Act*, s. 6. After appeal, the magistrate is merely a magisterial officer; *District Courts Act of 1891*, s. 159. By entering into recognizances, under s. 34, he consented to jurisdiction of District Court. After appeal to final Court prohibition does not lie. The claim of set off is raised in s. 37 of *Small Debts Act*. In schedule D set off is mentioned.

Drake: Prohibition is the only remedy. It is for an amount under £10 for which no appeal is provided, and no remedy but prohibition.

(To be continued.)

IN CHAMBERS.

LILLEY, C.J.

4th March, 1892.

Re LYONS, AN ARTICLED CLERK.

Solicitor—Articled Clerk—Town Agent—Assignment—Reg. Gen., 12th Dec., 1879, rr. 18, 19, 36.

An articled clerk was articled to R. Lyons, of Rockhampton, on 27th August, 1888, and after serving with him for a few months came to Brisbane and entered the office of his master's town agents on 14th January, 1889, and served with them under the original articles, with the consent of his master and for the benefit of the clerk, but no assignment was made, the arrangement being that after some service he should return to Rockhampton and continue in the service of his master. In July, 1890, the clerk returned to his master in Rockhampton, but an agreement was shortly after made that he should enter the office of Mr. Brumm, of the same place, and have his articles assigned to Mr. Brumm. The clerk accordingly entered the service of Mr. Brumm on the 4th August, 1890, but the assignment of the articles was not executed till the 11th March, 1891. The Board of Examiners for solicitors refused to admit the clerk to his intermediate examination, not being satisfied with the service.

Held, that the clerk had had the necessary supervision, and that under the circumstances he might be admitted to examination, and that a year out of the eighteen months might be reckoned good service, and the period before the execution of the assignment to Mr. Brumm, but that the clerk must serve the other six months beyond the term of his original articles. *Ex parte Brutton*, 23 L.J. (Q.B.), 290, followed.

Seem, a clerk articled to a solicitor in the country cannot perform part of his service with his master's town agent without an assignment of his articles.

PETITION by F. J. Lyons, an articled clerk, praying that the Board of Examiners for solicitors be directed to admit him to the intermediate examination in April, and that all notices given may be effectual for the said examination.

The facts of this case are that Francis Joseph Lyons was articled on the 27th August, 1888, to Robert Lyons, of Rockhampton, solicitor, and served with him until the 14th January, 1889, when, with the consent of the said Robert Lyons and for the benefit and instruction of the petitioner, he came to Brisbane to the office of Messrs. Chambers, Bruce and McNab, the town agents for the said Robert Lyons, and served with them in their office, and under the principal supervision of A. W. Chambers, a member of that firm, for eighteen months, the original articles being still in force and no assignment of them having been made, the arrangement being that, after seeing some practice in the office of the said Messrs. Chambers, Bruce and McNab, the petitioner was to return to the office of the said Robert Lyons and continue his service. In July, 1890, the petitioner returned to Rockhampton and served for a few weeks with Robert Lyons, when it was agreed that he should have his articles assigned to R. A. Brumm, of Rockhampton, solicitor, and he thereupon entered the office of the said R. A. Brumm on the 4th August, 1890, but the assignment of the articles was not executed till 11th March, 1891, although the petitioner was serving during that period in the office of Mr. Brumm, and has since continued in his service. Application was made to the Board of Examiners for solicitors to admit Lyons to his intermediate examination, but the Board refused the application on the grounds: (1) That

the assignment of articles from Robert Lyons to R. A. Brumm was not registered within six months from the date thereof; (2) That eighteen months of his service to Mr. Lyons was with the town agent of his master without a fresh contract of service; that his service from 4th August, 1890, to 11th March, 1891, was with Mr. Brumm, though the assignment was not executed till the latter date, shewing two periods of eighteen and seven months respectively not under the supervision of the master to whom he was articled. Lyons appealed against this decision.

Lilley, for petitioner: Lyons has served the necessary time and had sufficient training. There is no provision in our rules for service with a town agent, and where our rules are silent the English practice should prevail. No assignment is necessary to the town agent. The facts are identical with those *In re Brutton*, 23 L.J. (Q.B.), 290. The Court has in several instances relieved articled clerks. *Cross*, 12 L.J. (Q.B.), 138; *Mathews*, 1 B. and Ad., 160; *Cordery* on solicitors, 13; *ex parte Adams*, 4 Ch. D. 39. There are many instances in which clerks have served with the town agent without an assignment. It would be a great hardship to refuse the application.

Scott, for the Board: The rules as to service have not been complied with, and the Board could not waive them. There are certain specific rules, and no mention is made of service without articles except in Reg. Gen. 1879, r. 19, where, after four years' service, an articled clerk may become a pupil of a practising barrister. Rule 18 requires the whole period of service to be under articles. *Ex parte Brutton* was not followed *In re Adams*, 44 L.J. (Q.B.), 102; *ex parte Harrison*, *ibid.* 103. In *ex parte Smith*, W.N. 1877, 4, the Court allowed a reasonable time out of the service.

THE CHIEF JUSTICE: This is a hard case, and hard cases often make bad law. I am satisfied that the petitioner has had the requisite supervision, and following the decision of Jessel, M.R., *In re Adams*, he may be admitted to examination. As to the question of service, it has been very irregular, and articled clerks must take more caution in comply-

ing with the rules. I will allow him a reasonable time out of the service with Mr. Chambers, one year; and, as to the service with Mr. Brumm before the execution of the assignment, as some time must have elapsed in preparing the assignment and the service was otherwise good, I allow that period as in *Brutton's case*. The Board were right in their action. He may now go up for examination, but must serve a period of six months beyond the original term of his articles.

Solicitors for petitioner: *Chambers, Bruce and McNab*.

IN INSOLVENCY.

HARDING, J.: 7th March, 1892.

Re RAINE.

*Insolvency Act (38 Vic., No. 5) s. 44, sub. 12—
Meeting of creditors—Act of insolvency.*

The words "any meeting," in subsection 12 of section 44 of *The Insolvency Act*, do not necessarily mean a meeting called under the Act.

CREDITORS' petition.

Robert Raine, by a circular, called his creditors together and offered a composition of ten shillings in the pound, which was not accepted. A request was then made to him by a majority of creditors present to file his petition, but this had not been done within forty-eight hours after such request.

Drake, for the Queensland Farmers' Co-operative Company, the petitioning creditor, applied for the adjudication of Robert Raine.

C. B. Lilley, for the debtor, submitted that the words "any meeting," in sec. 44, sub. 12 of *The Insolvency Act*, referred to a meeting under the Act. The debtor had not committed an act of insolvency.

HARDING, J., was of opinion that the words "any meeting," did not necessarily refer to a meeting called under the Act, and made an order for the adjudication of the debtor.

Solicitor for petitioner: *H. E. Smith*.

Solicitors for insolvent: *Lilley & O'Sullivan*.

IN CHAMBERS.

LILLEY, C.J. 2nd March, 1892.

Re ORR, Ex parte MARKWELL.

Bills of Sale Act of 1891 (55 Vic., No. 23) s. 5, ss. 1, 4—Further advances—Place of registration.

A bill of sale securing a sum less than £50 and further advances is not given in consideration of a limited principal sum, and should be registered in the Supreme Court.

A copy of a bill of sale from Orr to Markwell was, on the 27th of February, presented by Messrs. H. B. Lilley and Cowlishaw at the Supreme Court Office for registration, the consideration for which was stated as the sum of £32 16s. 9d. then due and owing from Orr to Markwell. The bill of sale was given to secure that sum and any further advances that might be made.

The Registrar, in examining the document, stated that the amount mentioned in the bill of sale was under £50, and as there was no covenant on the part of the mortgagee to make further advances, he thought it came under the provisions of subsection 4 of sec. 5 of the Act, and should therefore be registered in the office of the Court of Petty Sessions at South Brisbane, and not in the Supreme Court Office.

The question, at the instance of the solicitors for the mortgagee, was referred by the Registrar to His Honor The Chief Justice in Chambers.

Harold Lilley appeared for the mortgagee, and contended that under *sub-sec. 4 of sec. 5 of the Act* the bill of sale should be registered in the Supreme Court, as although the amount stated therein was only £32 16s. 9d., yet it secured further advances, and that therefore the consideration was not a limited principal sum not exceeding £50, and referred to the 2nd schedule to *The Stamp Duties Act Amendment Act of 1890*, providing for the payment of duty upon mortgages to secure the repayment of future advances, the amount whereof is not stated or limited.

THE CHIEF JUSTICE, on looking at *The Bills of Sale Act* and the schedule to *The Stamp Duties Act Amendment Act*, decided that, as there was a

possibility of the principal sum exceeding the sum of £50, the bill of sale should be registered in the Supreme Court Office, and *nunc pro tunc* to protect the mortgagee's rights thereunder.

Solicitors for applicant: *H. B. Lilley and Cowlshaw.*

HARDING, J.

11th March, 1892.

MILES v. FITZGERALD.

Practice—Order XIV, r. 1a—Requisites of affidavit in support of summons for final judgment.

The affidavit in support of a summons for final judgment, under O. XIV, r. 1a, should contain a statement that the defendant has entered an appearance to a specially indorsed writ. Where an affidavit in support contained no mention of a specially indorsed writ or entry of appearance by the defendant, leave to withdraw the summons was granted on payment of the defendant's costs.

Fitzwalter v. Val Dare Opal Co., 3 Q.L.J., 162, followed.

SUMMONS for final judgment.

The affidavit of the plaintiff, in support of the summons, set out the cause of action in the form of an affidavit for execution, and stated that, in his belief, there was no defence.

Powers, in support of application.

Scott, for defendant, raised the preliminary objection that there was no mention in the plaintiff's affidavit of a specially indorsed writ, or that the defendant had entered an appearance. *Annual Practice*, (1892) 285; *Cavanagh, Summary Judgment*, 82, 85. In the case of *Fitzwalter v. Val Dare Opal Co.*, 3 Q.L.J., 162, an attempt was made to cure this omission by filing a supplementary affidavit, but the summons was dismissed with costs.

Powers: The affidavit of plaintiff contains all that is required by the rule. The fact that the writ was specially indorsed and appearance entered need not appear on the affidavit. The other papers are filed. The defendant has been served with the specially indorsed writ.

HARDING, J.: The Court must have everything before it to found its jurisdiction. The affidavit should mention that there has been a specially

indorsed writ, and that the defendant has entered an appearance. The copy of the affidavit served on the defendant with the summons must contain everything to be used at the application. I appear to have considered this point before in the case of *Fitzwalter v. Val Dare Opal Co.* The latest English decisions on this rule are very strict.

Powers then applied to withdraw the summons, and offered payment of defendant's costs, which were fixed at seven guineas.

Scott did not oppose.

HARDING, J.: Order—Leave to withdraw summons.

Solicitors for plaintiff: *Morton & Powers.*

Solicitors for defendant: *Chambers, Bruce & McNab*, agents for *Barnett.*

NORTHERN SUPREME COURT.

FULL COURT.

March 15th, 1892.

HARLOVICH v. BRADLEY AND OTHERS.

Quashing Order—Service of Order Nisi on Crown Law Officers—Justices Act (50 Vic., No. 17) s. 209.

An order nisi to quash a conviction or order of justices should be served upon the Crown Law Officers.

King v. Chester, 2 Q.L.J., 186, followed.

MOTION for an order, under s. 209 of *The Justices Act*, to quash a conviction, under s. 19 of *The Towns Police Act*, for unlawfully discharging firearms.

Macnaughton moved the order absolute.

Jameson appeared to show cause.

CHUBB, J.: I am informed that the order nisi has not been served upon the Crown Law Officers, which has been the practice for many years in the Colony, and has been judicially noticed in *King v. Chester*, 2 Q.L.J., 186.

Macnaughton: That case was not decided under the present *Justices Act*. Section 209 prescribes the persons upon whom the rule should be served, and does not mention the Crown Law Officers.

CHUBB, J.: I think it is still necessary to serve

them, and accordingly I direct the order to be enlarged until the 29th instant, in order that this may be done.

Solicitors for appellant: *G. A. Roberts & Leu.*

Solicitors for respondents: *Daly & Beaumont.*

IN CHAMBERS.

CHUBB, J.

March 24th, 1892.

SMITH v. MORRIS AND WALKER.

Quashing Order—Service of Order Nisi on prosecutor—Justices Act (50 Vic., No. 17), s. 209.

Where an order nisi to quash a conviction or order of justices has been obtained, it must be served upon the prosecutor as well as the justices. If this is not done, and the statutory time for obtaining the rule has expired, the Court has no power to amend the rule by inserting the prosecutor's name.

Ex parte Snowden, Wilkinson's Queensland Magistrate, 2nd edition, p. 16, followed.

APPLICATION made under s. 209 of *The Justices Act*, to quash an order made by C. A. M. Morris, P.M., and J. B. Walker, J.P., at Charters Towers, on 18th February, 1892. An order nisi having been granted by Chubb, J., in Chambers, *Costello* moved to make it absolute.

Macnaughton, who appeared to show cause, raised a preliminary objection to the application being heard on the merits. The prosecutor has not been called on to show cause, as required by sec. 209 of *The Justices Act*. In *Wallace v. Sayers*, Townsville, 6th August, 1891, the Northern Full Court directed an order to be amended and re-served for the same reason. This cannot be done in the present case, as the statutory time allowed for obtaining the order has expired; *Ex parte Snowden* (New South Wales Supreme Court, 23rd August, 1858, reported in *Wilkinson's Queensland Magistrate*, 2nd edition, p. 16.).

Selwyn Smith, who appeared for the Crown, relied on the same objection.

Costello: There was no prosecutor at the time the rule was granted, the original complainant having before that withdrawn from the case.

CHUBB, J., held that the objection was fatal, at the same time intimating his opinion that the appellant would otherwise have succeeded on the merits, and discharged the rule without costs.

Barrister and Solicitor for appellant: *A. Costello*

Solicitors for respondents: *Daly & Beaumont*, agents for *Marsland & Marsland*, Charters Towers.

Solicitor for the Crown: *G. C. Selwyn Smith*, Crown Solicitor.

CHUBB, J.

March 28th, 1892.

FERGUSON v. SMITH.

Prohibition—Appeal—Small Debts Act of 1867 (31 Vic., No. 29), ss. 29 and 34.

Prohibition will lie to a Small Debts Court in cases where the judgment is under £10.

Pettigrew v. Townley, 1 Q.L.R., pt. ii, 31, followed.

Costello moved to make absolute a rule for a prohibition directed to C. A. M. Morris, Police Magistrate at Charters Towers, and the plaintiff, to prohibit the proceedings in an action brought by the plaintiff against the defendant, in the Small Debts Court at Charters Towers, in respect of the dishonour of a cheque for £3 14s. 6d.

Jameson, before showing cause, took a preliminary objection. Prohibition will not lie in the present case; where the judgment of an inferior Court is erroneous, appeal is the only remedy: *Short & Mellor's Crown Practice*, pp. 70-74; *Griffin v. Ellis*, 3 P. & D., 398. There is no appeal from the Small Debts Court when the judgment on the sum sued for is less than £10: *Small Debts Act of 1867*, s. 34. Cases under £10 shall be heard and determined according to equity and good conscience; *Ibid*, s. 29.

Costello: Section 29 of *The Small Debts Act* applies only to rules of evidence, and not to rules of law. An erroneous judgment in point of law is an excess of jurisdiction; therefore prohibition lies in respect of it.

CHUBB, J.: The objection taken by Mr. Jameson that prohibition will not lie in this case, is, in my opinion, unsound. The authorities he cites for the proposition are not in point. *Griffin v.*

Ellis refers to an Ecclesiastical Court. The text writers in *Short & Mellor's Crown Practice*, at p. 74, say that "it is still somewhat doubtful whether the erroneous proceedings in the inferior tribunal be questioned by appeal or by prohibition," but they cite cases which go to show that the privilege of appeal does not take away the right to prohibition. *A fortiori* is the right to prohibition, where, as here, the right to appeal is restricted to cases of £10 and upwards. If an inferior Court assumes jurisdiction on a point of law this Court will interfere; *Brown v. Cocking*, L.R. 3, Q.B. 672; *Elston v. Rose*, L.R. 4, Q.B. 4. We have, however, a decision of this Court to establish the right of prohibition to a Small Debts Court; *Pettigrew v. Townley*, 1 Q.L.R., pt. ii, p. 31, per Lutwyche, J. This objection, therefore, fails.

His HONOR then proceeded to deal with the case on the merits, and discharged the rule.

Solicitors for the plaintiff: *Jarvis & Turner*.

Barrister and Solicitor for defendant: *A. Costello*.

FEBRUARY SITTINGS OF THE FULL COURT.

(Continued from page 154.)

EASTERN MINERS' GOLD MINING COMPANY v. SELLHEIM AND ANOTHER.

THE CHIEF JUSTICE: The rule in this case was granted for prohibition on two grounds, viz.:—(1) that the defendant's claim was not a proper subject for plea of set off; (2) that P. F. Sellheim had no jurisdiction to give judgment for the amount of the set off in excess of plaintiff's claim. If the first ground is right, it is clear that the magistrate had no right to give judgment for the excess. We are agreed that the defendant's claim was not a proper subject for a set off, and certainly the magistrate had no power to give judgment for the excess. This was a case in the Small Debts Court, and there was jurisdiction to hear the plaintiff's case; but we are all agreed that there was no jurisdiction to hear this plea—the plea of set off—

or to give the judgment that was given. Of course the ordinary set off is within the jurisdiction of that Court, but this was a set off by way of cross-action for unliquidated damages, and was not a subject for cognizance by the justices of the Petty Debts Court. They could not give judgment for the excess, and they would be wrong no matter what form their judgment might take. The judgment having been given, however, there is no doubt that the defendant was right in seeking to appeal, and had the right of appeal to the District Court. The principal point in the case depends upon the construction of section 34—

"If either party to any cause heard in any of the said Courts of Petty Sessions in which the judgment of the Court or the sum sued for shall amount to the sum of ten pounds or upwards shall be dissatisfied with the determination or direction of the Court such party may appeal to the nearest District Court which shall be held within the district in which said Court of Petty Sessions shall be situate."

"Provided &c."

In this case the plaintiff's claim was for £6 odd, but the judgment was for more than £10. There was no jurisdiction to give that judgment for £10, or for the sum in excess, which amounted to over £10; and therefore, there is no appeal under this section 34. We have held in *Garde's case*, 4 Q.L.J., 9, that where there is no jurisdiction in the lower Court there is an appeal to the District Court Judge. It would be an extraordinary thing if we had held otherwise, because, if a party invokes the jurisdiction of the lower Court and there is no jurisdiction, and notwithstanding that fact the lower Court gives judgment upon him, there would be no remedy whatever. The man would have to be content with the injustice. There is an appeal from the decision when there is no jurisdiction, and the appeal in this case appears to have been to the District Court. Here the appellant had the benefit of that. He went to the District Court, and the District Court Judge decided the matter as the Court below had done. It is quite clear that if the Court below had no jurisdiction to give judgment for the defendant, the District Court Judge had no jurisdiction to do so. The question then arises—"what is th

remedy against the judgment of the two Courts?" The motion here has been made for prohibition. *The District Courts Act* provides that, where a party is desirous of appealing from a judgment of the District Court Judge, he must go to the Judge and get him to state a special case. That is a speedy and comparatively inexpensive remedy. If there had been no appeal by special case or otherwise from the District Court, the Full Court would have granted a prohibition in order to restrain these inferior jurisdictions within the limits assigned them by law. But here the defendant has invoked the aid of the Court, and of a very expensive, extraordinary, and peculiar jurisdiction, rarely and reluctantly exercised by the Court except where justice absolutely demands it, and certainly not where there is a less expensive and a speedy remedy. It appears that my brother Harding pointed out that the applicant ran the hazard of paying costs, and told him that the Court did not give an extraordinary remedy where there was a more immediate and less expensive one provided. That being so, we think that the proper remedy would have been to have asked the District Court Judge for a special case. We will not grant a prohibition. We cannot overrule *Garde's case*. The rule will be discharged; and now comes the question of costs. Looking at the difficult question involved—probably this is the first time that it has been raised here—and at the fact that the defendant ought to have known that he had no right to hold his judgment for that excess—he should have given way and not have forced the plaintiff to come here to get relief—we will grant no costs.

HARDING, J.: The party should have given way; but as he did not do so, the Court will do all it can, by the exercise of its discretion, to show their disapproval of such proceedings. That is the reason why the Court will allow no costs.

REAL, J.: I concur on the same grounds as those stated by the learned Chief Justice. The objection to the actual decision of the magistrate seems so manifestly in accord with the law, that the parties, by exercising reasonable intelligence,

ought to have known that it could not be sustained.

Rule discharged accordingly, without costs.

Solicitors for plaintiff: *Morris & Heiner*.

Solicitor for defendants: *F. I. Power*.

MARCH SITTINGS OF THE FULL COURT.

RAWLINGS v. HALY AND ANOTHER.

Injuries to Property Act of 1865 (29 Vic, No. 5)
s. 26—*Bonâ fide claim of title—Jurisdiction of justices.*

R agreed to sell land to C. C paid part of the purchase money. About three weeks afterwards, but before the whole of the purchase money had been paid, R began to remove the wire from the fence surrounding the land agreed to be sold. C laid an information against R, under section 29 of *The Injuries to Property Act of 1865*. It appeared from the evidence that there was a dispute as to certain of the terms of sale. C said R was entitled to take away a crop of potatoes. R said he was entitled to take away the improvements, and that he removed the wire under the *bonâ fide* belief that the property was his, and that he was entitled to do so.

R was convicted and ordered to pay a fine of £5, with £7 for damages, and £3 3s. for costs, or in default of payment, to be imprisoned for three months.

Held, that this was a *bonâ fide* claim of right, and that R should be relieved of the order for fine and imprisonment.

MOTION, made at the February Sittings of the Full Court, to make absolute an order calling upon Charles Richard Haly, Police Magistrate at Dalby, and James Clarke of Dalby, to show cause why the conviction of William Rawlings, under the 26th section of *The Injuries to Property Act of 1865* (29 Vic., No. 5), should not be quashed on the grounds: (1) That there was no evidence to support the conviction. (2) That the evidence showed that the defendant acted under a *bonâ fide* claim of right. (3) That the said Charles Richard Haly had no jurisdiction to try or decide the matter of the said complaint, as defendant raised a *bonâ fide* claim of title in himself as against the complainant to the fence alleged to have been destroyed, and to the land upon which the same

was situate, and the conviction involved a decision as to such title.

Perske, for appellant, moved the rule absolute.

Wilson, for respondent Clarke, appeared to show cause.

Wilson took a preliminary objection that defendant had not exhausted all his remedies. The conviction was under section 26 of *The Injuries to Property Act*, and remedy was by way of appeal to the District Court, as provided by section 71. On the merits, he contended the question of title was for the justices as a matter of fact. The justices have decided that it is not a *bonâ fide* claim of right, and the Court will not interfere. He referred to *Reg. v. Walker*, 4 Vic. Rep., (L.) 452; *Reg. v. Blackburn*, 32 L.J., (M.C.) 41, 46; *Paley v. Birch*, 16 Law Times Rep., 410; and *Stone on Justices of the Peace*, p. 72.

Perske referred to *Paley on Convictions*, p. 144. "Whenever the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted" He quoted in support *Reg. v. Burnaby*, 2 Id. Ray., 900; *Reg. v. Huntsworth*, 33 L.J., (M.C.) 131; and *Reg. v. Cridland*, 27 L.J., (M.C.) 31.

Decision was reserved; prisoner meanwhile being allowed out on bail, himself in £40, and two sureties in £20 each, or one surety in £40, with condition that prisoner surrender himself into custody if rule discharged. Recognizance to be taken before any justice of the peace.

At the March Sittings of the Full Court, the following judgment was delivered:—

LILLEY, C.J.: This is an application to quash a conviction against one William Rawlings, under the statute against the malicious destruction of property. The charge against him was that he destroyed maliciously a quantity of fencing, the property of the complainant, one James Clarke, and the magistrates convicted him, and ordered him to be imprisoned, in default of payment of a fine of £10, for three months. He was imprisoned, and at last Court the Court gave him bail. Therefore, if he has suffered, it has been from his own obstinacy, not from the action of the

Courts. The ground on which the rule is sought—and it was raised at the trial—is, that Clarke alleged he had a *bonâ fide* claim of right. The circumstances are somewhat remarkable. It appears that the fence which Clarke was charged with destroying stood between two properties which belonged to the defendant. There was a dispute whether the fence stood upon his own land or upon the other piece of land which he had agreed to sell to the complainant Clarke. It appears that there had been transactions between them of this kind. There is no doubt that there was a contract in which the defendant agreed to sell to Clarke a piece of land adjoining his own. Part of the purchase money was paid to Rawlings, the defendant, and then there was a dispute as to certain of the terms. Clarke said he was entitled to take away a crop of potatoes from the allotment which he had sold. The defendant said he was entitled to take away the improvements. It is clear that on the day for the completion of the contract, by the payment of the full amount, the purchaser Clarke was a defaulter. Then Rawlings began to remove the wire from the fence, and that is the offence with which he was charged before the magistrates. He set up the claim that he was entitled to take it away as part of the improvements, and the evidence was taken on which the magistrate decided that it was not a *bonâ fide* claim of right. Beyond the fact of his attempt to remove the fence, there was no evidence of any want of *bonâ fides*, and on the other hand the admitted matters—the non-payment of the purchase money, the right to move a crop of potatoes, and other little circumstances—all went to show that there was between the parties matter of dispute, and the question is, if I may use a familiar term, was this a mere bogus assertion, or was it a *bonâ fide* claim and assertion of his right to the improvements? What object could he have? What could he secure by these proceedings? If the contract was "off" entirely by reason of Clarke's default, there was nothing to be gained by the removal of the fence. If, on the other hand, the property was still within the

grasp of Clarke, and he could assert his right under the contract under which he was admittedly a defaulter, he had half the purchase money, and might have recouped himself for any injury in consequence of Rawlings taking the wire from the fences. Upon the whole we think it ought to have been held by the magistrate there was a *bond fide* claim of right, and that this man should be relieved of the order for fine and imprisonment. The conviction will, therefore, be quashed, with costs against Clarke.

HARDING, J., and REAL, J., concurred.

Rule absolute accordingly, with costs.

Solicitor for appellant: *E. Winter*.

Solicitors for respondents: *Wilson, Newman-Wilson & Hemming*.

LOWRY v. QUEENSLAND GENERAL INSURANCE CO.

Fire insurance—Conditions of policy—Removal of building—Other insurance—Agent—Waiver—Estoppel.

L insured an hotel with the defendant Company. The hotel was situated at Nine Miles, but subsequently pulled down and re-erected at Cooroy. The defendants knew the second locality, and accepted a premium after the re-erection. The pulling down and re-erection were not communicated to the defendant Company. They knew the description of the policy sufficiently covered the hotel. The hotel was burned down, and the defendants set up a breach of the conditions of their policy.

Held, that the Company was estopped from setting up a breach of condition about the change in the situation.

Held, also, on the plea that the plaintiff had not given notice of a second insurance, that assent to subsequent insurance was also assent to the renewal of the same, in the same or any other company.

Parsons v. Standard Insurance Company, 4 U.C., Ap. 346, and *Pacaud v. Monarch Company*, 1 L.C.J., 284, followed.

MOTION, made at the February Sittings of the Full Court, for a rule absolute setting aside the judgment entered for the plaintiff, on the ground that the defendants were entitled to judgment, or for a new trial, on the ground that the judgment was against the evidence. The plaintiff had

effected an insurance with the Queensland General Insurance Company, on property known as the Engineers' Arms Hotel, to the extent of £250. The building in question was used as a hotel, and was situated at the Nine Miles, on the main road between Brisbane and Gympie. Prior to its acquisition by the plaintiff it belonged to a person named Rogers, who also carried on a hotel at Gympie. He transferred to the plaintiff, who subsequently removed the hotel to Cooroy. In June, 1891, the building was destroyed by fire, and plaintiff sought to recover the amount of his insurance. The defendant Company disputed his claim on the grounds, among others, that he had failed to supply full particulars of his loss within fifteen days of the fire; that the position of the hotel had been changed without their knowledge and consent; and that the plaintiff had effected a reinsurance in the South British Insurance Company for £100, without giving due notice of and receiving sanction to the same.

Sir S. W. Griffith, Q.C., A.G., and Rutledge, for defendants, to move absolute the order *nisi*; *Lilley*, and *Dickson*, to show cause.

Lilley: The action was tried before Mr. Justice Real in November last. Plaintiff sued on a policy for £250, effected with the defendants on April 12th, 1889, covering the Engineers' Arms Hotel, furniture, stock-in-trade, and outbuildings, situated on the Gympie Road. Defendants pleaded, amongst other things, that plaintiff had not given notice of a second insurance on the building; had failed to give a particular account of his loss within fifteen days of the fire; and that either there was a misstatement in the description of the property, or in the alternative a change of its situation. The jury found that full particulars of loss had been rendered within the prescribed time, that the new policy was a substitution for an old one, effected with the knowledge of the defendants, and that the latter knew the exact situation of the hotel, and accepted premium on the policy six months before the fire occurred. A rule *nisi* was granted in December last, on the grounds that on the findings the defendants were entitled to judg-

ment or a new trial. So long as the answer to the question No. 27 remains—namely, that the defendants left everything concerning the policy to their agent Corser, they are not entitled to judgment. With respect to the grounds for a new trial, the answers Nos. 13, 14, and 15, are wholly immaterial. The jury found the new policy in the South British Company was a substitution of an old policy in the Victoria Insurance Company. Corser effected it, and the defendant knew he was going to effect it. But the answers are immaterial anyway. I will contend Lowry did not effect the insurance in the South British, but his mortgagee. [REAL, J.: There was no dispute about Corser being Lowry's agent. He certainly effected the insurance on behalf of Lowry.] The law respecting the substitution of policies is in *Porter on Insurance*, 2nd ed., p. 174. It was there laid down that an insurance effected in substitution, subsequent to the policy sued upon, did not avoid the first insurance if the grantors received notice. In support of this the author quoted the Canadian cases of *Parsons v. The Standard Insurance Company*, 4 U.C., (App.) 326, and *Pacaud v. Monarch Insurance Company*, 1 Lr. Can. Ju. 284. The reason of that was, when a man increased his policies on the quiet, the probabilities were that he was arranging to have a fire. But here there was no alteration of the amount at all. If Porter's dictum was good law, the answers 13, 14, and 15, were perfectly immaterial. [REAL, J.: Supposing it was not good law, would the answers be in your favour?] Why not? Defendants waived their right to object afterwards. [REAL, J.: They have done nothing to waive. The answers only went to show this. We knew the plaintiff was going to insure for £100 again. Would that justify such insurance?] I submit it would. Defendants left all changes to their agent. [REAL, J.: There was a case in Massachusetts, where it was held when agents effected several policies on the one building they must give notice to the insurance companies.] Corser did let defendants know of the insurance in the South British. They were asked first to increase the risk from £250 to £350,

and when they replied that they did not care to, he effected the additional amount elsewhere. [HARDING, J.: I find whichever way these questions can be answered there would be no change in the position.] No, it is simply a change of places. In condition No. 2 the word "other" insurance means "further" insurance. [HARDING, J.: The defendants argue that the South British insurance is an additional one.] That cannot be so. The jury had evidence on the one side that the stock was valued at £100, and on the other side that it represented £45, and accordingly they pleased themselves and gave plaintiff £70. The rule should be discharged with costs.

Sir S. W. Griffith, Q.C., A.G.: The principal questions raised are in respect to the conditions made in the policy. Some people think companies only make conditions to have them disregarded, but insurance offices are entitled to surround themselves with conditions and stand by them. The nature of their business required this, and such contracts are made for the purpose of protecting them against fraud. In the present case the only question for the Court to consider was, had the case been brought within the conditions of the contract? If not, then plaintiff's course of action should have been an equity suit to prevent defendants setting up the conditions. There are two conditions that the defendants rely on—namely, No. 1, dealing with the alteration of risk; and No. 2, in reference to making another insurance. If these have been broken, then it rests with the plaintiff to show that he is entitled to recover. On the question of alteration of risk, it was found the hotel was first erected on the Nine Mile site, and the defendants never knew till after the fire the exact position where it had been re-erected at Cooroy. That was a change of situation and of the nature of things. The hotel ceased to exist and was rebuilt. Clearly this amounted to an avoidance of the policy. [REAL, J.: That would apply equally if the hotel had been taken down and re-erected in the same place.] Certainly. The conditions being broken it remains for plaintiff to show he is entitled to the premium. That

he has not done. The hotel ceased to be a building when it was pulled down, and became a heap of material, which the policy did not cover. [HARDING, J.: The policy was void whilst the hotel was in pieces. But before February 6th the material was re-erected, and defendants accepted a premium for the term of the new policy. Was that sufficient to require a new seal?] Yes. Plaintiff can only sue on the policy by showing defendants are estopped from setting up the conditions. [REAL, J.: The defendants accepted the premium after the change.] But not with a knowledge of the change, and without such knowledge they were entitled to set up this condition. [REAL, J.: During the currency of the premium they could set up that defence, but not after its expiry.] I submit it is not a question of construing the contract, but making a new one. The defendants stipulated for notice of change. The question for the Court is, was there any change? [THE CHIEF JUSTICE: No. The question is, which building did the defendants insure, the hotel at Nine Mile or the one at Cooroy?] If the original description is right, then there was a change in the second building which was not what the policy effected. [REAL, J.: Can the defendants object to the change after taking the premium with a full knowledge of the second situation?] The policy cannot be changed so as to cover a building upon another site. The jury say it ought not to matter. [REAL, J.: The jury only answered the facts, and said the change did not matter.] When the defendants took the premium it was under a misapprehension, because they never knew anything about the change. There could be no estoppel or waiver set up by the plaintiff without a knowledge of the material fact. [THE CHIEF JUSTICE: This appears to be a new contract every year, and when defendants take a premium, do they not make certain that it is for the place as it stands at the time?] So it would be if defendants knew the change of venue, and all the facts to enable them to estimate the hazard. It was not the same thing to lead the defendants to understand the insurance was on a building that had been standing for four years, as

on one only erected two years. [REAL, J.: You are in the same position at every renewal, it strikes me. During the currency of the premium, probably you have no alternative—you must continue through the whole term unless there is a breach—but at the expiration of the year you are at liberty to go on or not. You can then accept or reject the risk as you like.] [HARDING, J.: The real question is whether the house burned down is the same as the one originally insured.] If the policy is to be treated as a new contract, then the description of the building is all wrong, and amounts to misrepresentation. On the second condition it was a question of construction. What was the meaning of the word "other" insurance? The first thing to consider was whether the policy in the South British Company was capable of another construction. In what forced sense could it be said not to be another contract? The jury might say it could not make any difference, but the defendants had been deprived of their right to withdraw when they heard a further policy had been effected. They had lost that opportunity, and it could not be reinstated. The moral, if not the physical, risk had been increased, and the onus, therefore, was on the plaintiff to show defendants could not set up the conditions of the policy. It was submitted further, the evidence did not support the findings impeached, and on these grounds the rule should be upheld.

C.A.V.

At the March Full Court the judgment of the Court was delivered as follows:

LILLEY, C.J.: The rule *nisi* in this matter was argued at the last sitting of the Full Court. The rule called upon the plaintiff to show cause why the judgment entered for him by Mr. Justice Real should not be set aside and judgment entered for the defendant Company. Dealing first with the minor points, we think there is sufficient to sustain the findings on all the questions of which the numbers were given, and we also think there is no ground for the reduction of the damages. There was a conflict of testimony on each side, and the jury took a medium sum, and

we think that their finding on that matter is unassailable. Then there remain two points, which were the principal points argued before the last Full Court. These points were both allegations of breach of the conditions endorsed upon the policy. The first was that, after the policy was issued, there was a material change in the location of the house and other things which were insured—that, in fact, the building stood at the time the policy was made on a different site, and had since been pulled down, taken to pieces, and not rebuilt for about three months, and then removed to and re-erected on the site where the house was when the fire occurred, and it was burned down. The judgment is asked for the defendants, on the ground that there was a breach of condition No. 1, inasmuch as the plaintiff having pulled down and removed the house without notifying the fact to the Insurance Company, was not entitled to recover on the policy. There is no doubt that the pulling down and the re-erection of the building was not communicated to the Company, and that is a breach of the conditions that they complain of, and which, they say, entitles them to hold the policy as null and void. In fact, the Company never seem to have known of the building standing on the first site, unless the knowledge of Mr. Corser, who was interested as mortgagee in the insurance by Lowry, can be taken to be knowledge by the Company. The Company, through their agent at headquarters, did not visit, but they actually knew the new site—that is the site upon which the building was standing at the time the fire occurred. They knew it before the fire occurred, and they knew it before they were paid, and they accepted the last premium. They accepted the premium, therefore, with full knowledge of the actual location of the building which had been insured with them. It is clear, and it is not disputed, that the description in the policy would cover the new site of the old building. There was a great deal of subtle argument about the existence or non-existence of the actual thing insured, but I think that, in the view we have taken of the matter, that is probably of

no consequence. We need not deal with these subtleties, on the conclusion we have come to on the matter. What appears is this. Before the fire occurred, and before the Company accepted payment for insuring the building, they knew the actual site where the building was standing when it was burned. They also knew that the description of the policy sufficiently covered it. The doctrine of estoppel applies to a corporation as well as an individual, and it is clear that a company would be estopped if the individual would be estopped. If the Company knew the actual site covered by the description in the policy, and accepted money for insuring the particular building on that particular site, they would be estopped from saying they insured a building on the site on which it previously stood. The doctrine of estoppel applies, and there is authority which we think good for holding that upon the first ground the Company would be estopped from setting up a breach of condition. On the first ground, therefore, the rule cannot go. The second ground is also one of forfeiture. Judgment is asked for against the plaintiff in favour of the defendants, on the ground of forfeiture of his right under the second condition of the policy, which provides that persons insuring property must give notice in writing of any other insurance on the same property, and if they fail to do so the policy becomes null and void in the case of loss. Now, embodied in the description of the dwelling is a statement which might be taken to be notice of another insurance. There is an endorsement on the back that the building is insured for £100 in the Victoria Insurance Company. Now, in the course of the transactions between the parties, it appears that the insurer, through Mr. Corser, applied to the Company—the Victorian Company having withdrawn from this class of business—to take the additional risk of £100, which would have brought their risk of £250 up to £350. Their agent declined to take the additional risk. Corser had previously informed them that another insurance would be substituted if the Company refused it. As they refused to accept the further risk, Corser

insured in another company, the defendant Company making no complaint of the sufficiency of the substituted Company; in fact, that Company have paid their contribution to the loss which afterwards occurred. The insurance was effected in another Company—I think the South British. No notice appears to have been given of the substitution, and no endorsement was made therefore on this policy of the change or substitution. That is alleged to be the breach of the second condition, and it is alleged that it entitles the Company to judgment, because the policy has become null and void in consequence of the neglect to inform them of this other insurance. We were inclined to hold, and in fact we do hold, with the American and Canadian Courts on this point. There is no English authority to help us, so we have nothing else to guide us. Having given very careful consideration to the decisions of the American and Canadian Courts, we think those Courts were right in declaring that assent to subsequent insurance was also assent to renewal of the same, in the same or any other office. Now, there is no doubt that the defendant Company were informed in the letter from their principal when they were told that, if they refused the risk, it would be offered to another office. They refused to take it. That being so, there was assent to subsequent insurance, and the case falls within the principle of the American and Canadian cases. Here there was notice in the policy itself that there was a further and additional insurance of £100 beyond the risk taken by the defendant Company. The agent of the defendant Company had notice and assented to the change of insurer, and he intimated that, as the defendant Company would not take the additional risk, they had no objection to it being taken by another Company. There was, therefore, a substitution—if anything at all—there was a substitution of an insurance, not an additional insurance affecting the principle as applicable to conditions of this kind. It was a substitution of a new insurer, and it had the assent of the defendants. That being so, we think the case falls within the principle of the American and Canadian cases, that there was

no breach of this condition, and that the rule must on all grounds be discharged with costs.

HARDING, J., and REAL, J., concurred.

Rule discharged accordingly, with costs.

Solicitor for plaintiff: *F. I. Power*, Gympie.

Solicitors for defendants: *Hart & Flower*.

EMMOTT v. QUEENSLAND MERCANTILE COMPANY,
LIMITED.

Injunction—Company—Inspection of books.

The plaintiff was a shareholder in the defendant Company. By the Articles of Association, certain books were to be kept by the directors, and to be open, on certain conditions, to inspection by the shareholders. The plaintiff requested leave to inspect certain of the Company's books, and was refused. He thereupon issued a writ for an injunction restraining the Company from preventing him, at all reasonable times, having access to the Company's books of account, and inspecting and perusing the same.

On a motion for an injunction in terms of the indorsement of the writ, an order was made by Lilley, C.J., for an injunction in the terms prayed for, and the defendants were directed to allow the plaintiff to inspect the books at specified times.

Held, on appeal, that the order was too large; that the order should have directed the motion to be brought on with the hearing; and, that the original order should be so varied, the *status in quo* of the books being preserved.

Daniel v. Ferguson, (1891,) 2 Ch., 27, followed.

APPEAL from an order of His Honor The Chief Justice, for an injunction, and for inspection of the books of the Company.

The plaintiff was the holder of fifty shares in the defendant Company. By article 101 of the Articles of Association, certain books of account were to be kept, and by article 102 it was provided—

"The books of account shall be kept at the registered office of the Company, and subject to reasonable restrictions as to the manner of inspecting the same, that may be imposed by a resolution of the members of the Company in general meeting, and subject also to three clear days' previous notice to the secretary, shall be open to the inspection of the members, between the hours of one and three p.m."

Plaintiff wished to make an inspection of the books, and on the 14th January last wrote to the secretary, giving notice of his intention to inspect

them on Monday, the 18th January. The letter was not received till the afternoon of the 15th January. On the 18th the plaintiff called at the office of the Company and, on demanding to see the books, was told he could not see them. He called again on the 20th January, and the secretary again refused to let him inspect them. Plaintiff then consulted his solicitors, who sent a formal notice, dated 1st February last, demanding, as solicitors for and on behalf of plaintiff, an inspection of the books, between one and three o'clock, on the 5th of February. Two clerks called at the appointed time, but were refused an inspection. On the 16th February the plaintiff issued a writ "for an injunction to restrain the defendant Company from preventing the plaintiff from having access, at all reasonable times, to the books of accounts kept at the registered office of the Company for the purpose of inspection and perusal, and from preventing the plaintiff from taking extracts from such books of Accounts."

On 2nd March a notice of motion was heard, that the defendant Company, its servants, and agents, be restrained, in terms of the indorsement on the writ of summons.

Lilley, for the plaintiff; *Sir S. W. Griffith, Q.C., A.G.*, *Feez* with him, for the defendant Company.

Lilley read the affidavits of plaintiff, and of *J. A. Gallwey* and *C. A. Ball*, which set out the facts stated above, and quoted *Holland v Dixon*, 37 Ch.D., 669; and *Mutter v. Eastern and Midland Railway Company*, 38 Ch.D., 92.

The Attorney-General objected to plaintiff's affidavit on the ground that deponent's occupation was not stated.

His Honor held that, as the first paragraph of the affidavit stated deponent was a shareholder in the Company, the omission was supplied.

The Attorney-General: The plaintiff acted irregularly throughout in not having given proper notice, in not attending at the Company's office at the prescribed time, or, in fact, placing himself in a position to entitle himself to the privilege given by the Articles of Association.

LILLEY, C.J.: It seems to me as if there had been an absolute refusal to let the books be seen, and that in itself is sufficient to entitle the plaintiff to his injunction. I will, therefore, grant the injunction, and direct the defendants to allow plaintiff to make an inspection of the books between one and three o'clock on Friday, and so on, from day to day, till the inspection has been completed.

Notice of appeal from this order was served on the third day of March last, and on the fourth day of March a notice of motion was heard, that all further proceedings on the order of 3rd March be stayed, pending the hearing of the appeal therefrom.

Lilley, for the plaintiff.

Feez, for the defendant Company.

Lilley opposed the motion on the grounds set out in a further affidavit of the plaintiff, which stated that it was the intention of the Company to pass resolutions for the express purpose of expunging the 102nd article from the Articles of Association.

After argument, an order was made, by consent, that further proceedings on the order of 3rd March be stayed, pending the hearing of the appeal of which the defendant Company had given notice, and which appeal the defendant Company then undertook to prosecute without delay, and to have heard at the sittings of the Full Court in March next. And, further, that, in the event of the said appeal being dismissed, the rights of the parties should stand as then; and that, in such event, the plaintiff should have access to the books of account of the defendant Company at such times between the hours of one and three p.m. as he shall appoint, on a day within seven days after the decision of the Full Court dismissing such appeal should be made known, and then afterwards from day to day, between the same hours.

On appeal to the Full Court.

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and *Feez* with him, for the appellant Company; *Lilley*, for the respondent.

Griffith, Q.C., A.G.: As to inadmissibility of plaintiff's affidavit on grounds of no description of deponent, cited *O. XXXVI*, r. 3c; *Chitty's Archbold*, 14th ed., p. 459; *O. LVIII*, rr. 1, 2; *Shirer v. Walker*, 2 M. & G., 917. On the merits the affidavits do not shew that the Company have failed in any duty they owe to the plaintiff—Articles of Association, s. 101—three clear days' notice have not been given. *Lindley on Companies*, p. 439; *The King v. Wiltshire and Berkshire Canal Company*, 3 Ad. & E., 477; *Reg. v. Great Canal*, 1 Ir L.R., 337.

Byrnes, S.G.: The rights of the plaintiff here are the rights of a shareholder arising out of a contract; he has a limited right of inspection; the notice would not enure for all time. The injunction being granted amounted to an acceleration of relief. *Lindley*, p. 440.

Lilley: As to form of action, *Holland v. Dixon*, 37 Ch.D., 669, and *Mutter v. Eastern and Midlands Railway Company*, 38 Ch.D., 92. As to a mandatory injunction, *Bonner v. Great Western Railway Company*, 24 Ch.D., 1; per Fry, L.J., at p. 10; *Hermann Loog v. Bean*, 26 Ch.D., 306; per Pearson, J., at p. 311; and per Cotton, L.J., at p. 314; *Kerr on Injunctions*, last ed., p. 51. There was an absolute refusal shown by defendants own facts. If terms were granted, order should be that the *status in quo* of the books up to the 7th March should be preserved for inspection, if defendant be found to be entitled to it. *Daniel v. Ferguson*, (1891), 2 Ch., 27.

Griffith, Q.C., A.G., in reply: Plaintiff never properly complied with conditions; he had merely the right, under the contract, to see them; it was not the duty of the Company to assist him.

HARDING, J.: This is an appeal from an order by His Honor The Chief Justice, on an application for an injunction. The order directs the defendants to allow plaintiff to make an inspection of the books of the defendants, between one and three o'clock p.m. on Friday, and so on from day to day till the inspection has been completed. It is against that order that the appeal is made. The facts, so far as I find them necessary to state, are

as follows:—The plaintiff is a shareholder in the defendant Company, and by rules 101 and 102 of the Articles of Association, certain books are to be kept by the directors, and are to be open, on certain conditions, to an inspection by the shareholders. I do not find it necessary to-day to go into the question of what these books are, and what the times of inspection are, or what the circumstances are which give rise to this right. These are questions which are in litigation in the suit, and which, if decided in the plaintiff's favour, will give him the right which he requires, namely, to inspect the books of the Company. That being so, I proceed very shortly to consider the general rights. First of all I will consider what an action is. It is a mode which the law has pointed out whereby persons may litigate and get legal decision upon their disputes. Therefore, an action having been commenced for the decision of this Court, pending that decision, the Court has power to grant an injunction. Injunctions are of two kinds, prohibitory and mandatory, both having the same object; the object of an interlocutory injunction is to preserve the property pending the litigation, so that, by the acts of the parties during the litigation, the property shall be available to the successful party in the state in which it was; in other words, neither party shall be injured by the delay that is necessarily caused in the prosecution of the action until the hearing. Prohibitory injunctions are for restraining destruction, and restraining the person having the property from dealing with vested rights, and restraining him from doing any injurious act. A mandatory injunction is one that orders a party to do something. Now I see no reason why the same principle which applies to one should not apply to the other, namely, the preservation of the rights until the hearing. In the case of *Daniel & Ferguson*, cited this morning, the point was the raising of a wall. The defendant accelerated his building tactics as soon as he became aware that the plaintiff was going to stop him by injunction. The mandatory injunction there was, that he be restrained from raising the wall until the hearing of the suit, and that he re-

move so much of the wall as he put up since the commencement of the trial. I do not know of any cases where more than that has been done. The order is to be preventive and preservative. If in this case the injunction mandatory is issued, the subject matter of the action will be destroyed, because the action was for discovery—that is, the secrecy of the defendants' business is to be invaded if the plaintiff is to be allowed before the hearing to see the books. That secrecy once invaded the Court has no means of emptying the man's mind of what he has received. If he once receives the information the parties cannot be replaced in the same position. That being so, the injunction in the terms granted should not go, and I think the order should have been made to direct the motion to be brought on with the hearing. It has been suggested by Mr. Lilley that the *status in quo* of the books on the 7th March, the date on which a certain question arose—unnecessary to be further mentioned—ought to be preserved. I think there is nothing unreasonable in acceding to that proposition, although I do not wish it to go forth that a party can come into Court and ask for an injunction without showing injury or threatened injury, or threat of the continuance of the injury to the property or right in dispute. But when a case comes before the Court, the Court can modulate and adapt its order to the circumstances of the case; and the Judge of the first instance in this case, I understand, will give his assistance. He thinks it not unreasonable to accede to the suggestion of Mr. Lilley, and I am not prepared to differ with him. I will therefore join with him in an order which will confirm the *status in quo* until the hearing. Therefore, the order will be varied in the way I have stated.

REAL, J.: I am of the same opinion. The injunction as granted in this case would decide the substance of the action, the whole action, and not anything incidental to it. Now it becomes necessary in the course of all applications for injunctions, that the judge should decide not merely the law, but all the facts necessary to enable him to determine the propriety of granting an interim

or interlocutory injunction until the hearing; but although he may decide the facts for the purpose of granting an injunction necessary to preserve the property, I think he is not entitled to decide them for the purpose of determining the whole action. Here the whole action is for the purpose of inspecting these books. The effect of the injunction as it at present stands, is to give that. I therefore think it is too large. If it were clear that the plaintiff had not performed the conditions entitling him to an inspection of the books, he would be entitled to no relief by way of interim injunction or otherwise. And it was for the judge, before whom the application was originally made, to decide that question for the purpose of determining whether or not an interim injunction to preserve the books in *statu quo* should be granted. I agree with my brother Harding that the plaintiff is entitled to have the books preserved in the state they were on the 7th March. As it will necessarily become the province of the judge or jury before whom the action is tried to decide between the parties as to the plaintiff's right to inspection, it also becomes necessary that the books shall be kept in such a state that, on the determination of the right, the plaintiff, if he succeeds, will have the benefit of the judgment in his favour. For these reasons, I think the order as made should be limited as stated by Mr Justice Harding.

THE CHIEF JUSTICE: I agree with the judgment and the reasons. It is not necessary that I should enter into the matter at all. I think in making the order I went beyond what the parties meant I should do, but it is not unusual where the parties wish it, for the judge below to determine on the evidence before him, in effect the whole matter. No doubt I made a larger order than I should have made. I agree with my brother judges that the plaintiff ought to be restrained from a present inspection; for, if he gets that, he gets all he would get on a hearing. One important question is raised as to the law and condition of companies. Either the plaintiff has the right he claims here, or he has not; and if I,

under a misapprehension, have over-stepped in the slightest degree the line of my authority, why then, no doubt, I must be brought within it. I think, probably, the order was too large, and I think the modification that is proposed is a just one. I do not suggest that the books are likely to be interfered with. At all events, when we are doing right we should do all that is right; and I think the entries in them should be preserved in the same state as they were on the 7th March, so that the plaintiff will not be deprived of the right which he would have had previous to the day when the resolution was passed by the Court that no inspection should be allowed. The motion for the injunction will have to be brought on at the hearing of the action, and, in the meanwhile, the *status in quo* of the books is to remain preserved.

No costs allowed.

Solicitors for plaintiff: *Chambers, Bruce & McNab*.

Solicitors for defendants: *Macpherson & Feez*.

In re The Stamp Duties Acts of 1866 and 1890, AND AN AGREEMENT BETWEEN SMITH AND ANOTHER, AND GILCHRIST AND ANOTHER.

Stamp Duties Act of 1866 (30 Vic., No. 14), ss. 3, 21—Stamp Duties Act Amendment Act of 1890 (54 Vic., No. 28), ss. 4, 21—Construction of agreement—Stamp duty.

The executors of H, who was in partnership with Watt and Gilchrist, agreed to sell H's interest in the freehold property of the partnership, on condition that the parties took over the whole of H's liabilities. H's share was one-third of 42,462 $\frac{3}{10}$ acres, valued at ten shillings an acre. The third share of H in that amounted to £7,077 1s., but the whole of his liabilities, including partnership debts, amounted to £16,919 13s. 3d. A deed of transfer was executed of the land in pursuance of such agreement.

Held, that the true consideration for the first agreement was £7,077 1s., and that that sum was the amount on which stamp duty was payable.

THIS was a special case stated by the Stamp Commissioners, under s. 21 of *The Stamp Duties Act of 1866* (30 Vic., No. 14), for the purpose of determining the amount of stamp duty legally

chargeable on a certain memorandum of transfer, and memorandum of agreement, made between Fergus Jago Smith and Lancelot Noel Smith, executors of the will of William Harvey Holt, late of Glenprarie, in the Colony of Queensland, grazier, of the one part, and John Brown Watt and William Oswald Gilchrist, of the other part.

Mansfield, for the appellants, Fergus Jago Smith and Lancelot Noel Smith; *Dickson*, for the respondents, the Stamp Commissioners.

Mansfield: Duty is levied under s. 3 of *Stamp Act of 1866*. Schedule-I, "conveyance,"—defined also in s. 4 of *Stamp Duties Act Amendment Act of 1890*. From the memorandum of agreement it appears that the late William Harvey Holt was a partner with John Brown Watt and William Oswald Gilchrist, in certain properties consisting of freehold land, and other station properties. His executors, Fergus Jago Smith and Lancelot Noel Smith, on 26th November, 1890, entered into an agreement with his late partners to sell his interest in the freehold property, on condition that they took over the whole of his liabilities. The interest of the deceased amounted to a third of the partnership property. For the purposes of the agreement the freehold property, consisting of 42,462 $\frac{3}{10}$ acres, was valued at 10s. an acre, or in total at £21,231 3s. The third share of the deceased in that came to £7,077 1s., but his other liabilities, including his share of partnership debts, brought the sum up to £16,919 13s. 3d. The partners agreed to take that amount and relieve the executors of the whole of the deceased's liabilities. A deed of transfer was thereupon executed of the land, of which the deceased's share was valued at £7,077 1s. The Stamp Commissioners claim that stamp duty is payable on £16,919 13s. 3d., and the Court is now asked to decide whether it is rightly payable on that sum, or only upon £7,077 1s. He cited *The National Land Company, Limited, v. The Comptroller of Stamps*, 9 Vic. L.R., (Law), 87. The questions for the Court are: (1) What is the true amount of value and consideration upon the true construction of the said two instruments for which the said first-

mentioned instrument was executed? (2) What is the full amount of stamp duty with which the said first-mentioned instrument is by law chargeable?

Dickson contended that *Holt's* liability to his partners was £16,919 13s. 3d., and that stamp duty was properly chargeable on that amount.

LILLEY, C.J.: The true value must be taken to be ten shillings per acre, and therefore the answer to the first question is: £7,077 1s.; and to the second question is: the amount payable on £7,077 1s. The deposit of £10 is to be returned, and the appeal will be allowed with costs

HARDING, J., and REAL, J., concurred.

Solicitors for appellants: *Hart & Flower.*

Solicitor for Stamp Commissioners: *Crown Solicitor.*

Re THE WILL OF JAMES SWAN, DECEASED.

Will—Charitable bequest—25 Vic., No. 19, s. 3—Registration—Number of witnesses—7 Vic., No. 16, s. 3—Succession Act (31 Vic., No. 24), ss. 39, 45—50 Vic., No. 13, ss. 5, 6.

James Swan, by his last will, bequeathed *inter alia* a legacy to the treasurer of the Wharf Street Baptist Church, and the Queensland Baptist Association was appointed residuary legatee. Both institutions were duly incorporated under *The Religious, Educational, and Charitable Institutions Act of 1861*. The will was attested by two witnesses, but not registered.

Held, without considering the effect of a less number of witnesses than three, that registration was a condition precedent to the validity of such bequests, and that they must fail.

SPECIAL case stated by consent for the opinion of the Court.

This action was commenced on the 24th day of December 1891 by a writ of summons whereby the plaintiffs claimed as executors and trustees of the will dated the 14th day of February 1890 of James Swan deceased to have the real and personal estate of the said James Swan administered the defendant Christina Swan being sued as one of the legatees and *cestuis que trust* under the said will. The defendant the Baptist Association of Queensland being sued as one of the *cestuis que trust* under the said will and the defendant the Corporation of the City Tabernacle being sued as one of the legatees under the said will. And the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court.

1. James Swan late of Brisbane in the Colony of Queensland freeholder a member of the Legislative Council of the said Colony deceased by his last will and testament dated the 14th day of February 1890 appointed the plaintiffs Richard Gailey of Brisbane aforesaid architect and William Henry Ewing of Brisbane aforesaid manager of the Scottish Queensland Mortgage Company (therein after called his trustees) to be executors and trustees of his will and (amongst other bequests not necessary to be herein set out) bequeathed all his household furniture and other household effects together with the cows horses etc. in and about his residence at Burnside to his wife the defendant Christina Swan for her own sole use and benefit absolutely and directed his trustees to allow his said wife the use and enjoyment of the house in which he lived during the term of her natural life so long as she continued to occupy the same as her residence. And the said testator also bequeathed the sum of £500 sterling to the treasurer for the time being of the Wharf Street Baptist Church in Brisbane aforesaid and gave devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust that his trustees should sell call in and convert into money the same or such part thereof as should not consist of money and should with and out of the moneys produced by such sale calling in and conversion and with and out of such part of his personal estate as should consist of money pay his funeral and testamentary expenses and debts and the legacies bequeathed by his said will and should at the discretion of his trustees invest the residue of the said moneys as in the said will directed and should stand possessed of the said residuary trust moneys and the investments for the time being representing the same thereafter called the residuary trust funds. Upon the trusts following that is to say in trust to pay to his said wife the defendant Christina Swan an annuity or clear annual sum of £500 sterling during the term of her natural life unless his said wife should marry again in which case the said income should cease. And as to the residue of the annual income so to arise as aforesaid the said testator directed that the same should be paid to the treasurer for the time being of the Queensland Baptist Association in Brisbane aforesaid in such sums and in such manner and on such conditions as his trustees should think fit for the purpose of assisting them in supporting Evangelists who should be engaged in preaching by the said association subject only to the stipulations in the said will contained as to the doctrines to be held by such Evangelists and after the death of his said wife the said Christina Swan Upon trust to pay to the said treasurer for the time being of the said Queensland Baptist Association the annual income which should then arise out of the residuary trust funds in such sums and in such manner and on such conditions as his trustees should in their absolute discretion think fit for the purposes and on the conditions above stated. And the said testator declared that his trustees might postpone the sale and conversion of his real and personal estate or any part thereof for so long as they should think fit and he also declared that his trustees might let any hereditaments for the time being remaining

unsold either from year to year or for any term of years at such rents and subject to such covenants as they should think fit and might accept surrender of leases and tenancies and generally manage the same in such manner as they should think fit.

2. The said testator died on or about the 26th day of May 1891 while on a voyage from Brisbane aforesaid to the United Kingdom without having revoked or altered his said will.

3. Probate of the said will was duly granted to the plaintiffs the executors appointed by the said will on or about the 27th day of August 1891.

4. The house in the said will mentioned in which the testator lived stands on a block of land containing 19 acres or thereabouts. The said property (commonly called Burnside) was occupied and used by the testator as a whole upon his departure from Queensland as before mentioned a short time prior to his death.

5. The said house together with fences and out-houses upon the said property in the last preceding paragraph mentioned were at the time of the death of the testator and still are in a very dilapidated condition.

6. Prior to the execution of the said will the land upon which the said Wharf Street Baptist Church in the said will mentioned was erected was vested in trustees of the society or church of particular Baptists at Brisbane aforesaid upon the trusts contained in a trust deed dated the 4th day of May 1859 and registered in the office of the Registrar of Titles Number 173 Book 4.

7. In or about the month of August 1888 and prior to the execution of the said will in pursuance of the powers contained in the said trust deed in that behalf the said trustees sold the said land in the last preceding paragraph mentioned but the said trustees retained possession thereof under agreement with the purchasers till the month of October 1890.

8. The said trustees in further pursuance of the powers aforesaid applied the proceeds of the said sale towards the purchase of land on Wickham Terrace Brisbane aforesaid for the purposes of the said society or church and on or about the 17th day of July 1890 after the execution of the said will and prior to the death of the said testator the said trustees duly transferred the said land at Wickham Terrace aforesaid to the corporation of the City Tabernacle upon similar trusts to those contained in the said trust deed in paragraph 6 hereof mentioned and the said land still remains vested in the said corporation upon the trusts aforesaid. The said testator was one of such trustees and joined in the said transfer.

9. The corporation of the City Tabernacle hereinbefore mentioned was duly registered under the provisions of *The Religious Educational and Charitable Institutions Act of 1861* on or about the 7th day of January 1890 and the corporation of the Baptist Association of Queensland (in the said will called the Queensland Baptist Association) was duly registered under the said Act on or about the 15th day of February 1882.

10. The said will of the said testator was not attested by three witnesses nor registered as required by the said *Religious Educational and Charitable Institutions Act of*

1861 but was attested by two witnesses only and executed in the manner required by *The Succession Act of 1867*.

11. The Court is to be at liberty to draw inference of fact.

The questions for the opinion of the Court are—

1. Does the estate or interest of the defendant Christina Swan extend to the whole of the said land in paragraph 4 hereof mentioned or to any and what portion of the said land?
2. Is the defendant Christina Swan a tenant for life of the said land within the meaning of *The Settled Land Act of 1886*?
3. If not, what estate has the said defendant in the said land?
4. Is the said defendant or are the plaintiffs the trustees liable to repair or keep in repair the buildings on the said land?
5. Does the legacy to the treasurer for the time being of the Wharf Street Baptist Church in Brisbane take effect?
6. If so, to whom is the said legacy payable?
7. Does the gift of the residuary estate to the Baptist Association of Queensland (in the said will called the Queensland Baptist Association) take effect or did that testamentary disposition fail?
8. By whom or out of what funds ought the costs of this case to be paid?

Dated this twenty-ninth day of March, 1892.

The Attorney-General, Sir S. W. Griffith, Q.C., and Lilley, for plaintiffs, the executors and trustees of the will. *The Solicitor-General, Byrnes, and Wilson*, for Christina Swan, the widow of deceased. James Swan. *Gore Jones and Crisp Poole*, for the Baptist Association of Queensland.

The Attorney-General: The will is not attested by three witnesses as required by *The Religious, Educational, and Charitable Institutions Act of 1861*. *The Wills Act* was in force when *The Repealing Act of 1867* was passed. *The Succession Act* re-enacted *The Wills Act* in the same terms. *The Repealing Act*, sec. 8, deals with the commencement of the Act which is not to affect any Registration or Insolvency Act. On the question of the wife's estate, *Maclaren v. Stainton*, 27 L.J., Ch. 442; *Stone v. Parker*, 29 L.J., Ch. 874, were cited. By *The Settled Lands Act*, sec. 5, a person beneficially entitled under a settlement to possession of settled land for his life, was the tenant for life under that settlement. Sec. 6 (f) enacts that a tenant for his own life, whose estate is liable to cease in any event during that life, or to be defeated by an executory limita-

tion or gift, or is subject to a trust for accumulation of income for payment of debts or other purposes, has the powers of a tenant for life when the estate is in possession. *In re Paget*, 30 Ch.D., 161, it was decided that a tenant for life has power to sell his estate and apply the proceeds to a trust.

Byrnes, S.G.: *Paget's case* is a conclusive authority on the interest of the defendant Christina Swan in the land. As to whether she is bound to repair, the premises are in a dilapidated state. It would be better for her to sell. The trustees contend she is bound to repair. [HARDING, J.: If she is to have it only as long as she lives in it, the trustees could destroy her estate by making the house uninhabitable.] On the authority of *In re Hotchkys*, 32 Ch.D., 408, she is not bound to repair. As to the construction of *The Charitable Institutions Act*, if there was a failure to the Baptist Association, Mrs. Swan would get half, and the Crown the other half; there being no children or next of kin. The Wharf Street Church having merged into the City Tabernacle, the Act applies to that legacy. [HARDING, J.: So far as I see, registration is necessary before the bequests can be given effect to.] [LILLEY, C.J.: And it has not been registered.]

Gore Jones: The effect of non-registration is to allow persons with prior equities to come in and assert them to the detriment of the others. The direction that the will shall be registered, and the omission to mention the place of registration, render that direction abortive. [HARDING, J.: The law will not be set aside for that. It can be registered at any place of registration.] [LILLEY, C.J.: There is the old *Registration of Deeds Act*.] In all Statutes requiring registration of a document, the place of registration is pointed out, as in *The Mortmain Acts*. When the law is not clear, the subject should get the benefit of the doubt.

[HARDING, J.: You will find that this provision is inserted for the purpose of carrying out some principle of public policy. The Court will not allow that principle of public policy to be frus-

trated, and the only way to prevent that is to declare all instruments made in frustration void, and the will is an instrument in frustration.]

[LILLEY, C.J.: The Act is based on an old and well-known policy of the law. There was a time when the priests, and there is a time now when the ministers of religious denominations have great influence on the minds of persons. The object is to prevent any undue influence being exerted, and to give time for the relatives whose views may be affected to try and frustrate that influence. It is, in fact, to give notice to the relatives and the world that such an instrument is in existence. It is the principle of the old *Mortmain Acts*, and the draftsmen seem simply to have reduced the time from twelve to three months. It is not pretended that the will will stand the test either of three witnesses or registration.]

[HARDING, J.: Assume that you have succeeded as to the number of witnesses.]

[LILLEY, C.J.: That is not all. You must have three witnesses, and you must register within a month of the testator's death, the object being publicity, so that there shall be no disposition under undue influence.]

[HARDING, J.: I take it that if there is no registration the whole thing is void.]

Gore Jones: Is the devise to fail? [LILLEY, C.J.: Of course it is if registration is the essence of the validity of the instrument.] Must it fall into the hands of the residuary? [LILLEY, C.J.: That makes no difference, because it falls into the hands of persons who cannot receive it.] Suppose there is a wish to give to charity? [LILLEY, C.J.: You must have a valid instrument.] *The Succession Act*, sec. 39, provides that no will shall be valid unless attested by two witnesses. Section 45 enacts that every will so executed shall be valid without any other publication. These sections involve a negative which should be construed in favour of the beneficiaries against *The Charitable Institutions Act*. *Cumberland v. Copeland*, 1 H. & C., 194; *Lucraft v. Pridham*, 1 Ch.D., 205; *Reed v. Storey*, 13 L.J., M.C. 108, were cited.

Poole: As to the effect of *The Succession Act* on the number of witnesses required, mentioned the Statute 32 *Henry VIII*, c. 1, which was overriden by an Act two years afterwards. The powers of the trustees are so large that it is not necessary for them even to give the money to the Baptist Association. The following cases were cited:—*Beckford and Others v. Wade*, 17 Ves., 87; *Hall v. Wybourn*, 2 Salkeld, 420; *Aubry v. Fortescue*, 10 Mod. Rep., 205; *Pilkington v. Cooke*, 16 M. & W., 615.

LILLEY, C.J.: This is a special case stated for the opinion of the Court on certain dispositions contained in the will of the late James Swan. Some of these testamentary dispositions were for the benefit of his widow, Christina Swan, and other dispositions contained in the same will were, it is at all events contended, for the benefit of the Baptist denomination—the Wharf Street Baptist Church or the City Tabernacle, and the Baptist Association. There is not the slightest doubt in my mind as to the perfect sincerity of the testator in endeavouring to confer this benefit upon the Baptist body, of which denomination I have certain knowledge for many years that he was a most devout member. A very old friend of my own, I am therefore able to say that, at least, he made a sincere and honest attempt to confer these gifts, or benefactions, upon that body. And by-and-by I will speak of the nature of these gifts, and whether they succeed or fail—whether in fact his intention has been frustrated by neglect of legal observances. In the meantime I address myself to the question of the dispositions contained in the will which are undoubted—I mean those in favour of his widow. The first question stated in the case is: “Does the estate or interest of the defendant Christina Swan extend to the whole of the Burnside land, or to any and what portion of the land?” That was the land which had been occupied by the testator and his wife during his life-time. There is no doubt in my mind what the answer to that should be. It must be that the estate or interest of Christina Swan—that is her right to occupy this property

during her life—extends to all the property occupied by her husband in the way described. The answer to the question will be: “Yes, to the whole of the property so occupied by him.” Then there is the second question: “Is the defendant Christina Swan a tenant for life of the said land within the meaning of *The Settled Land Act of 1876*?” It is not seriously contended that she is not. We are of opinion that she is the equitable tenant for life within the meaning of *The Settled Land Act of 1876*, and that her occupancy is of that character. It is not necessary to answer the third question, because we have said that she is a tenant for life. There is no alternative to our opinion. Then the fourth question was: “Is the said defendant, or are the plaintiffs, the trustees, liable to repair, or keep in repair, the buildings on the said land?” If all the dispositions contained in the will were to take effect, including those made in favour of religious bodies, why there would be no fund out of which the trustees could repair. There is no obligation on them to repair, and there is no obligation on Mrs. Swan to repair. The only obligation is, perhaps, that she must either repair the cottage or live under an umbrella. There is no fund, and, in fact, she is not obliged to repair the cottage if she can occupy it without. The answer to that is: “No; neither party.” Then there is the fifth: “Does the legacy to the treasurer for the time being of the Wharf Street Baptist Church in Brisbane take effect?” That is a direct legacy to the treasurer, or in favour of the Wharf Street Baptist Church, and the other gift is somewhat more indirect. Both gifts are testamentary dispositions—that is: they are in favour either directly or indirectly of two corporations formed under *The Religious and Charitable Institutions Act of 1861*. That was an Act which was passed by the Legislature of the colony with a view to facilitating the incorporation of religious, charitable, and educational bodies and institutions, and to enable them to take gifts, benefactions, or property in every form, for the purposes of the work, religious, charitable, or educational, in which they might wish to engage. It was essential that

some such Act should exist, or that they should obtain incorporation from the Crown. This is really an inexpensive and facile mode of incorporating bodies of the character named, and giving them the opportunity of acquiring property from those parties who were in sympathy with their work. There is no doubt the testator in this instance was very deeply in sympathy with the work of the Baptist Church in this colony, and everywhere else in the world, and he has tried at least to convey his bounty to those bodies for the assistance of the work which they have in hand. If it had been possible to support the gift, we should certainly be disposed to do so. But the Statute under which these bodies are incorporated is a clear and specific policy, and it is founded on a well-known line of legislation in the mother-country, and we must, of course, carry out the purpose and policy of the Act. It demands of parties who wish to make these bounteous gifts that they should comply with certain observances, which are intended, under the specific policy of the Act, not only for the benefit of the parties who may be interested in the lands or properties of those parties in the event of their death, but also for the protection of persons who may be weak in the latter hours of their life from sickness, and who may be subject to, or, at all events, largely under, the influence of their spiritual advisers of any denomination whatsoever. Under the old mortmain laws the intention of the English Legislature was to prevent property getting into the hands of ecclesiastical corporations or bodies, and being, in fact, held in their hands for less profitable uses than they might otherwise be applied to if the land remained freely in circulation for the commercial, agricultural, and industrial uses of the community. And they require that the gifts intended to be made to religious bodies should be made upon certain observances akin to what is required by the Statute. Now, if the gifts were effectually made, with the due observances required by the Statute, why, of course, we would give effect to it. Now, what are the observances required? *The Mortmain Acts* were intended to

create a reservation of certain of the lands for the use of the community, so that they should not remain idle in the hands of the ecclesiastics. The Statutes took it upon them to declare they would give effect to the benevolence of testators if certain observances were complied with. So that a man wishing to dispose of his property to the uses of true religion, or any religion he believed in, could do so. At all events, if he wished to give his wealth to charity or religion, these observances should be complied with, for the reasons that he had stated—that the relatives should be protected in their interests, and that the dying person should be free from the pressure and the solicitude and undue influence of his spiritual adviser, who would naturally at his last hour have such potent influence over his mind. In fact, it was intended to secure that the gifts should be free from any form or fear of undue influence, and from any fear of over-affection which might at the moment be urged upon his mind. The observances required were set out in the 3rd section of the Act as follows:—"Every deed-of-grant, gift, benefaction, or testamentary disposition to, or in favour of, any such corporation, shall be made in the presence of, and attested by, three credible witnesses, and shall be executed and registered one month previous to the decease of the person making such deed-of-grant, benefaction, or testamentary disposition." With respect to the witnesses, it is not necessary that we should decide whether any alteration has been made by *The Succession Act* or *The Consolidation of the Wills Act* contained in it. It is not necessary for us to do so, but, I may say, that it might be unsafe for parties who made testamentary dispositions under this Statute, to neglect to have three witnesses. There is one matter on which the law is so clear that it is not necessary for us to decide that point. It is conceded that this will was executed in the presence of two witnesses only, and it is conceded—and this is the most important and the clearest point in the case—that it was never registered. The will will stand, of course, as to the dispositions to the widow and others, which were executed in

accordance with the general law. No registration is required in that case, and therefore all the benefactions to the widow will take effect; but in respect of the testamentary dispositions to, or in favour of, the Tabernacle and the Baptist Association, the gifts fail. I have gone through the Statutes, and I think it is perfectly clear that there was a place where the registration could have been made. It could have been made at the Registrar General's Department, so that the law could have been complied with. There is no difficulty in the way of registering the will. Then the answer to question No. 5 will be: "No." It is not necessary to answer No. 6. The answer to No. 7—"Does the gift of the residuary estate to the Baptist Association of Queensland (in the said will called the Queensland Baptist Association) take effect, or did that testamentary disposition fail?"—"No" as to the first part, and "Yes" as to the second. That is clear. As to the next—"Does the gift of the residuary estate to the Baptist Association have effect?"—the answer will be: "No; it fails." The costs of all parties will be allowed out of the estate as between attorney and client.

HARDING, J., and REAL, J., concurred.

Solicitors for the trustees: *Wilson, Newman-Wilson & Hemming*.

Solicitors for Mrs. Swan: *MacPherson & Feez*.

Solicitor for Baptist Association: *R. W. Kingsford*.

APRIL SITTINGS OF THE FULL COURT.

In re DYBALL.

Solicitor—Re-admission.

A solicitor who had been struck off the roll for misconduct (*ante* 3 Q.L.J., 9,) was re-admitted on proof of restitution, amendment, and present good character.

MOTION for re-admission of Robert Henry Dyball as a solicitor.

Mr. Dyball had been struck off the roll for professional misconduct in 1887, and had since that time acted as chief clerk for Mr. F. W.

Thompson, solicitor, at Roma. Affidavits were filed by Mr. Thompson, stating that Dyball had been in his employ as clerk, at a fixed salary, for five years, and that he was so satisfied with him that, if re-admitted, he would take Dyball into partnership; also, by G. S. Murphy, accountant, as to the state of the books and how they had been kept; also, certificates from residents in Bundaberg, where Dyball had practised, and Roma.

At the March Full Court leave was given to apply for re-admission at the next Full Court, on publishing the usual notices, and advertising in the usual manner, and also in a Bundaberg newspaper.

REAL, J., intimated that as he had been counsel in the previous matter he would take no part in the proceeding.

Byrnes, S.G., and Lilley, for the applicant.

Byrnes: This is in an application to the mercy of the Court. It appears from the report of the former proceedings (3 Q.L.J., 9,) that restitution had been made before the order for striking off the roll. The affidavits and certificates read show that Mr. Dyball is a person of good fame and character, and has conducted himself well during the last five years. In the words of the Canon law he must confess, do penance, and obtain absolution. He now throws himself on the mercy of the Court and seeks re-admission.

Feez, for the Law Association, did not oppose, but suggested the admission should be made conditional for twelve months.

LILLEY, C.J.: The solicitor was struck off the rolls for an offence which this Court has always regarded as a very serious one, but it has been rightly said that the Court does not refuse, after a lapse of years, where there has been amendment and restitution, and a better course of life, to restore occasionally a gentleman who has been subject to such a judgment, as in this case, to his former status. Here we hope it is true and sincere, and that the solicitor is contrite and sorrowful for the offence which has been committed. It must not be forgotten, and it must be remem-

bered in all fairness, that, at the time the original application was made, there was evidence that he had made restitution of the money which he had, for a time at all events, misappropriated. Under all the circumstances we will exercise the quality of mercy towards this solicitor, and restore him to his status with the hope that he will never appear before us under circumstances calculated to cast a shadow on his reputation. Let him be restored.

HARDING, J., and REAL, J., concurred.

Solicitors for applicant: *Chambers, Bruce & McNab.*

Solicitor for Law Association: *W. H. Osborne.*

IN CHAMBERS.

HARDING, J.: 1st April, 1892.

YOUNG v. IGUANA GOLD MINING COMPANY,
LIMITED.

District Courts Act of 1891 (55 Vic., No. 33), s. 129—Removal of action to District Court.

The remittal of an action should be to the District Court held at the circuit town, or within the circuit district of the place where the venue is laid in the action, and should only be changed on the same principles as apply to a change of venue in Supreme Court actions.

SUMMONS on behalf of defendant Company to remit action to District Court at Brisbane.

Leeper, in support of application, read affidavit of R. J. Leeper, setting out the statement of claim, and stating that action could have been brought in the District Court without the defendants' consent. No place of trial having been mentioned in the statement of claim, the venue is at Brisbane. O. XXXV, r. 1.

Frez, for plaintiff, read affidavit of H. Schacht, that the necessary witnesses in the action were resident in or about Croydon, and that remittal to Brisbane would considerably increase expense. He also referred to O. 129 of *District Courts Act of 1891*, and to *Harding Acts and Orders*, p. 610.

HARDING, J.: The remittal should be to the District Court held at the circuit town, or within

the circuit district of the place where the venue is laid in the action, and should only be changed on the same principles as apply to the change of venue in Supreme Court actions. Order—remit action to District Court at Brisbane; costs to be costs in action.

Solicitors for plaintiff: *Day & Schacht.*

Solicitor for defendant Company: *R. J. Leeper.*

IN INSOLVENCY.

HARDING, J.:

1st April, 1892.

Re ALEXANDER SIMPSON IN LIQUIDATION.

The execution creditor has a right to recover the necessary expenses of possession paid to the sheriff, notwithstanding the liquidation of the debtor.

NOTE of motion for an order that Robert McGavin, the receiver, do pay to the Bunya Saw-mill Company, Limited, out of the assets in his hands, the sum of £9 9s., being the amount paid by the said Company to the Sheriff of Queensland for expenses of possession; and that the said Robert McGavin do personally pay to the said Company the costs of, and relating to, the motion to be taxed. On the 28th September last a writ of *fi. fa.* issued against Alexander Simpson of South Brisbane, cabinet maker, in an action at the suit of the said Company, was executed by levying on valuable machinery and timber on the premises of the said debtor, and, on account of the timber being scattered, two bailiffs were placed in charge. On the 29th September last the debtor filed his petition for liquidation of his estate. On 3rd October last Robert McGavin was appointed receiver, and on the 5th October he attended at the sheriff's office and demanded possession of the property of the said debtor, held under the said *fi. fa.* The sheriff had been instructed not to give up possession, and, on being applied to, the solicitors for the Company refused to withdraw the bailiffs. An order *nisi* was then obtained from His Honor The Chief Justice, calling on the sheriff to show cause why he should not deliver up

possession of the books and effects of the said debtor to the said Robert McGavin, and such order was made absolute on the 8th October last. On the 16th October the solicitors for the Company wrote to the receiver asking for the costs of possession paid by them to the sheriff. The receiver referred them to his solicitor, and considerable correspondence ensued, and, finally, the matter came before the Judge in Chambers, on a note of motion as above.

Chambers appeared in support of the note of motion.

Hellicar for the receiver.

HARDING, J.: Order for payment of the £9 9s. costs of possession. Costs of the motion to be paid out of estate.

Solicitors for execution creditor: *Chambers, Bruce & McNab*.

Solicitor for receiver: *G. V. Hellicar*.

IN CHAMBERS.

HARDING, J.: 4th April, 1892.

SWANWICK v. BANKEN.

Practice—Specially indorsed writ—Interest—O. XIV, r. 1a—O. III, r. 6—Amendment of writ.

The writ in this case was indorsed for money lent at various periods during the year 1891, and, in addition, interest was claimed on each item at the rate of 8 per cent. per annum, under the provisions of s. 72 of *The Common Law Practice Act of 1867*.

Held, that the claim for interest was not the subject of a specially indorsed writ, and that the plaintiff could not amend.

SUMMONS for final judgment.

Cotham appeared for the plaintiff.

Lukin, for the defendant, raised a preliminary objection that the claim for interest was not the subject of special indorsement, and that, upon the construction of O. III, r. 6, interest can only be claimed upon a contract express or implied. The provisions of O. III, r. 6, do not include any case in which it is optional with the jury on a trial to

give interest as they may be advised, according to the justice of the case, the granting interest in such cases being in the nature of an award of unliquidated damages. He referred to 31 Vic., No. 17, s. 72; *Kavanagh on Special Indorsements*, p. 24; *Rodway v. Lucas*, 10 Exch., 667; 24 L.J., Ex. 155; *Bullen & Leake's Precedents*, pp. 51 and 52; *Annual Practice for 1892*, pp. 201, 202.

HARDING, J.: Interest is not recoverable in this case.

Cotham, for plaintiff, applied to amend the writ of summons by striking out the claims for interest.

Lukin objected that the claim contained more than a special indorsement. The indorsement must be solely confined to claims mentioned in the rule, and the plaintiff must succeed on the indorsement in its entirety, or not at all. The plaintiff cannot therefore amend. *Clarke v. Bowyer*, 36 W.R., 809; *Annual Practice for 1892*, p. 201 and 296.

HARDING, J.: The case of *Gurney v. Small*, W.N. (1891), p. 168, is in point. The summons must be dismissed, with costs.

Solicitors for plaintiff: *Swanwick & Cotham*.

Solicitors for defendant: *Morris & Heiner*.

LILLEY, C.J.: 22nd June, 1892.

A. MARTIN AND CO. v. PERKINS.

Practice—Writ specially indorsed—Order III, r. 6—Order XIV, r. 1a—Interest not arising by contract.

The writ in this case was indorsed for money paid by the plaintiff to the use of the defendant, and at his request, and interest thereon. A summons for final judgment was dismissed, as the interest claimed did not arise from a contract.

Gurney v. Small, (1891), 2 Q.B., 584, followed.

SUMMONS for leave to sign final judgment.

Mansfield appeared for plaintiff, and *Power* for defendant.

Power took a preliminary objection that the procedure under O. XIV, r. 1a, was not available, as interest not arising from contract had been

claimed. *Gurney v. Small*, (1891), 2 Q.B., 584; *Wilkes v. Wood*, 8 Times L.R. 465; *Swanwick v. Ranken*, ante, and asked for dismissal of summons with costs.

Mansfield asked for judgment for amount of principal without interest.

LILLEY, C.J.: That is in opposition to *Gurney v. Small*. The objection must hold, and the summons be dismissed with costs.

Solicitor for plaintiffs: *A. J. Thynne*.

Solicitors for defendant: *Macdonald-Paterson, Fitzgerald & Hawthorne*.

LILLEY, C.J.: 18th July, 1892.

CALEDONIA UNITED GOLD MINING COMPANY,
LIMITED v. MANN.

Practice—Specially indorsed writ—Order III, r. 6—Order XIV, r. 1a—Interest in blank.

A writ was indorsed for calls upon shares, but the amount of interest claimed was not entered in the printed form of the indorsement, and the objection that the proceeding was invalid was overruled, and leave to defend given.

A SUMMONS for leave to sign final judgment was taken out under O. XIV, r. 1a.

Osborne for plaintiff, *Power* for defendant.

Power took preliminary objection that the interest claimed invalidated proceedings. Table A to Schedule I. of *The Companies Act, 1863*, has been excluded here.

Osborne referred to indorsement on writ. Amount had not been inserted in the form, and hence the claim amounted to a claim for arrears of calls and interest on a blank amount.

LILLEY, C.J.: I do not think the proceeding is invalidated; the interest claimed is interest on nothing.

Power, on the merits, read affidavit of defendant, and leave to defend was given.

Solicitors for plaintiff Company: *Bernays & Osborne*.

Solicitors for defendant: *Macdonald-Paterson, Fitzgerald & Hawthorne*.

CIVIL COURT.

REAL, J.:

25th April, 1892.

Re THE QUEENSLAND DEPOSIT BANK, LIMITED,
IN LIQUIDATION.

Company—Liquidation—Compromise—Winding-up order—Companies Act, 1863, (27 Vic., No. 4), ss. 83, 90, —Companies Act Amendment Act of 1889, (53 Vic., No. 18), s. 35.

A petition had been filed for the liquidation of the Queensland Deposit Bank. A scheme of arrangement was afterwards suggested, and on petition to the Court by a creditor, Warren, an order was made convening a meeting under sec. 35 of *The Amendment Act of 1889*, when the scheme was unanimously approved of.

On an application to sanction the proposal, the following order was made:—Sanction the scheme; stay all proceedings except for carrying out the order; the costs and expenses, and remuneration of the provisional official liquidator, and Warren's costs, to be paid by the Company; and the costs of the petitioning creditor, as between solicitor and client. The provisional official liquidator to be removed, and directed to hand over the assets to the Company. Leave to apply. A compromise may be sanctioned at any time after the presentation of a petition.

PETITION for winding up the Queensland Deposit Bank, and petition by L. P. Warren, a creditor, proposing a compromise or scheme of arrangement. Edward Denny Day had been appointed provisional official liquidator, and the hearing of the petition was adjourned in order to allow the Directors of the Bank to submit a scheme to the creditors.

On the petition of Warren, the following order was made by Mr. Justice Real:—

"That after three weeks notice had been given by advertisement in two daily papers, a meeting of creditors be held to consider and sanction the scheme; a vote to be taken of all unsecured creditors, and a separate vote of all creditors under £25, and of all creditors over £25; creditors to be allowed to vote by proxy upon duly attested signatures; the provisional liquidator to summon the meeting and preside at it as chairman; and that the petition for the liquidation be further adjourned for four weeks."

The meeting was held in pursuance of the said

order, and the scheme of arrangement unanimously approved of.

By consent, both petitions were heard together.

Sir S. W. Griffith, Q.C., A.G., and Fitzgerald, for the petitioning creditor, Warren moved for an order sanctioning the scheme.

MacDonnell, for the provisional official liquidator, and The Queensland Permanent Trustee, Executor and Finance Agency Company, Limited, the petitioning creditor.

Griffith, Q.C., A.G.: The scheme is proposed under sec. 35 of *The Companies Amendment Act of 1889*. All the creditors represented at the meeting unanimously assented to the scheme. The total amount of debt represented at the meeting was £157,298, out of a possible total of £178,369. The requisite majority of creditors approved of the scheme, and the provisional official liquidator had filed a report. As to the procedure, a winding-up order is unnecessary. By sec. 83 of *The Companies Act, 1863*, the winding up of a company commences at the time of the presentation of the petition. By sec. 90 the Court may regard the wishes of creditors in winding up a company. In the *West Canada Oil Company*, L.R., 17 Eq. Ca., at p. 5, Lord Selborne expressed an opinion that the 91st section of the English Act, corresponding with sec. 90 in our Act, is applicable before a winding-up order is made. The scheme is a reasonable one. The order asked for is: To sanction the scheme of arrangement, to stay all proceedings in winding-up, except for the purpose of carrying out the order, the Bank to pay the official liquidator his costs, expenses, and remuneration; the Bank to pay the costs of the petitioning creditor, and of Warren, and to discharge the provisional official liquidator from his office, and to direct him to hand over to the directors the assets of the Company.

MacDonnell, on behalf of the provisional official liquidator, said he would submit to an order of the description asked for. There was some doubt whether the scheme could be sanctioned before a winding-up order had been made. There was no authority in favour of it. In the English

Act, 33 & 34 Vic., c. 104, s. 2, the wording is precisely the same as sec. 35 of the Act of 1889. There are decisions on those sections. [REAL, J.: Is there any authority against it? I think I have the power to make it now.] There is no decision against it. It is submitted that the provisional official liquidator should be appointed official liquidator in case the scheme should break down. He would be ready to carry on the business at any time. [REAL, J.: If it does break down, you can file another petition and get your costs.] As to costs, they should be as between solicitor and client, as the liquidator and petitioning creditor have been acting for the benefit and assistance of the Bank. The amount of the liquidator's remuneration is not fixed. [REAL, J.: There will be leave to apply.]

REAL, J.: It seems to me that I have power to make the order asked for at any time after the presentation of the petition, by the combined effect of secs 83 and 90 of *The Companies Act, 1863*, and sec. 35 of *The Amendment Act of 1889*. The order of the Court will be: Sanction the scheme of arrangement, stay all proceedings, except for carrying out the order; the costs, expenses, and remuneration of the provisional official liquidator, and Warren's costs, to be paid by the Company; the costs of the petitioning creditor to be paid as between attorney and client. Remove the provisional official liquidator, and direct him to hand over the assets to the Company, and leave for all parties to apply.

Solicitors for Warren: *MacDonald-Paterson & Co.*

Solicitors for the liquidator: *Chambers, Bruce & McNab.*

MAY SITTINGS OF THE FULL COURT.

Re ALEXANDER SMITH, AN ARTICLED CLERK.
Articled clerk—Solicitor—Date of admission—
Reg. Gen. of 12th December, 1879, rr. 2, 17.

An articled clerk who had obtained the certificate of the Board for his final examination, but too late to comply with the provisions of the *Regula Generala*,

allowed to apply at the next Full Court on filing an affidavit of the circumstances.

Byrnes, S.G., on behalf of Alexander Smith, an articled clerk, applied for leave to be admitted as a solicitor at the June Full Court. Mr. Smith had not obtained his final certificate in time to comply with the conditions necessary to apply at the May Full Court through a mistake, which was discovered on a review of his papers. By the *Regule Generales*, he can only be admitted on a robe day. The Board are represented here.

Bannatyne, and *Scott*, for the Board, offered no objection.

THE CHIEF JUSTICE: On the applicant filing an affidavit of the circumstances, there will be leave for him to apply at the next Full Court.

STEWART v. FRANCIS AND ANOTHER.

Vagrant Act of 1857 (15 Vic., No. 4), s. 2—No visible lawful means of support, or insufficient lawful means.

S was arrested for vagrancy. At the time of his arrest he had money on him, and immediately before the arrest, a friend had taken S's gold watch and chain into safe custody. S gave evidence at the Police Court that he was the owner of three racehorses, and produced receipts therefor; also, that he paid £1 per week for his board. S was sentenced to six months' imprisonment.

Held, that the means of support must be presumed to be lawful until proved to be the contrary, and that the conviction must be quashed.

MOTION to make absolute an order calling upon A. M. Francis, Police Magistrate, at Brisbane, and Timothy Sullivan, of Brisbane, Senior Constable, to show cause why an order or conviction made by the said Police Magistrate on the twenty-third day of April, 1892, whereby Joseph Stewart was convicted of an offence of vagrancy, having no lawful visible means of support, and was sentenced to six months' imprisonment with hard labour, should not be quashed, on the ground that there was no evidence before the said Police Magistrate that the said Joseph Stewart had no lawful visible means of support, or insufficient means of support.

Macdonnell, for appellant, to move the rule absolute.

REAL, J.: The question to be decided is whether this man comes under *The Vagrancy Act*. The evidence against him was that he had done nothing for his living for the last five or six years, and his own evidence was that he made "books" on races, that he owned two racehorses, which he ran at races, but which never won; and that the only way he made money was by betting and by "stiffening" his horses.

Macdonnell submitted that Stewart said he won money, but did not say he won it by "stiffening." [LILLEY, C.J.: Had he any money on him when the constable arrested him?] Yes. [LILLEY, C.J.: How then can you say that he had no means of support?] He had a watch and chain, some money, and two racehorses, the receipts for which he produced. Besides that he was paying £1 a week for his board and lodging. [REAL, J.: He had money clearly, and he had property, but his means of obtaining them were by cheating.] Not by cheating. He was convicted under the section relating to a person having no lawful visible means of support, or insufficient lawful and visible means of support. [LILLEY, C.J.: The means must be lawful.] [REAL, J.: The point here is that he won by "stiffening."] He did not say he won by "stiffening." He admitted "stiffening," but said he won money on his horses. *The Vagrant Act* applies only to a man's means, not to his character. [LILLEY, C.J.: The Statute, as I understand it, applies to his visible means. Is there any evidence to show that the money he had was unlawfully got?] Absolutely no evidence. [REAL, J.: His evidence was that he was a betting man, and won money by his horses—not by them winning, but by "stiffening" them.] He won £15 on one occasion, and won money by "stiffening." In his evidence he says "I have money, and had money when I was arrested. . . My horse, Terence, has not won any races. . . I won £15 because I backed the winning horse. . . I win money by my horse because I "stiffen" him. I have not won any money by The Gift."

[REAL, J.: You see he describes himself as a betting man, and then says he wins money by his horses because he "stiffens" them.] [LILLEY, C.J.: Horse-racing is a lawful game, but "stiffening" may be a matter of another sort.] It may be a highly immoral thing, but it is not unlawful to "stiffen" a horse. [LILLEY, C.J.: We must not make these Acts too inquisitorial.] [REAL, J.: The evidence was clear that his horses never won a race.] He could make plenty of money without running his own horses—by making "books" on the races. [LILLEY, C.J.: If a man has enough money about him for his immediate wants, how can we go into an inquisition as to how he got it? We should have to inquire into the affairs of every man in the country. Every man in Queen Street might be stopped.] The only question here is as to the character of the man. [REAL, J.: He had means of support; the only question is whether they were lawful]

LILLEY, C.J.: The rule must be made absolute. It seems to me that if a man has visible means of support, it must be presumed that they are lawful until it is proved to the contrary. This man had horses to begin with, and some money. I think that those Acts must not be construed too strictly, or there would not be a man in the country who could not be stopped and called upon to show that he had means of support.

HARDING, J., concurred.

REAL, J.: I think that the order ought to be made absolute, seeing that the man produced actual money, unless it can be shown that it was the proceeds of dishonesty.

Order absolute accordingly.

Solicitors for appellant: *Chambers, Bruce & McNab*.

IN CHAMBERS.

HARDING, J.: 4th May, 1892.

LANGE AND THONEMAN v. THE BURTON BREWERY COMPANY, LIMITED.

Costs — Action under thirty pounds — District Courts Act, 1891 (55 Vic., No. 33), ss. 126, 127.

Judgment by default was signed for a sum under thirty pounds, and an application for costs, on the ground that the probable costs of a trial in the District Court would exceed the costs of judgment by default, a certificate under s. 127 was refused.

The discretion of a judge of the Supreme Court as to costs under *The District Courts Act*, is taken away by s. 126, and in cases that come under the provisions of that Act, the Court cannot allow costs in cases under £30, unless satisfied that the provisions of that Act are applicable to the case.

APPLICATION for costs of action on a judgment under £30.

Chambers, for plaintiff: The plaintiff resides at Melbourne, and the defendants carry on business at Cairns, in Queensland. The action is on a Bill of Exchange. The probable costs of a trial in the District Court would exceed the costs of judgment by default in the Supreme Court, which amount to nine guineas. The costs of a trial in the District Court would include the expenses of witnesses from Melbourne, which would exceed nine guineas, s. 127, sub. 3a. Judgment by default is regulated by s. 75. Notice of defence is to be filed within eight days of service, as prescribed by s. 67.

HARDING, J.: I refuse to certify, because, under *The District Courts Act*, the discretion as to costs is taken away by s. 126, and in cases that come under the provisions of that Act the Court cannot allow costs in cases under thirty pounds, unless satisfied that the provisions of the Act are applicable to the case.

Solicitors for plaintiff: *Chambers, Bruce & McNab*.

JUNE SITTINGS OF THE FULL COURT.

In the matter of GEORGE CHARLES WILLCOCKS AND THE QUEENSLAND RAILWAY COMMISSIONERS, AND *In the matter of* *The Interdict Act of 1867*.

Arbitration — Excessive award — Jurisdiction of arbitrators to award themselves a specific sum.

On an arbitration between a contractor and the Railway Commissioners, it was objected that the arbitrators

exceeded their jurisdiction in admitting evidence in support of certain claims, and awarding in respect of the same; and that the costs awarded were excessive, and that the arbitrators had no jurisdiction to award themselves a specific sum. By condition 58 of the indenture, which was annexed to the submission, it was provided that want of jurisdiction, excess of authority, or irregularity of proceeding on the part of the arbitrators, should not form a good ground for objecting to their determination.

Held, on a motion to set aside the award on the grounds aforesaid, that, on the construction of the submission, the parties took the arbitrators with their law, and were bound by their decision; and, that the award was good on the face of it. *Hodgkinson v. Fernie*, 27 L.J. C.P., 66, followed.

Held, also, that the arbitrators had no jurisdiction to award themselves a specific sum, and that the award must be set aside as to that amount, without interfering with the rest of the award. No costs were allowed to either side. *Roberts v. Eberhardt*, 28 L.J. C.P., 74, followed.

MOTION made at the May Sittings of the Full Court, for an order that the award made by the arbitrators on a reference or submission to arbitration by mutual consent, between George Charles Willcocks and the Queensland Railway Commissioners, in respect of certain claims preferred by the said George Charles Willcocks against the said Queensland Railway Commissioners, be set aside on the following grounds, viz: (1) That the said arbitrators exceeded their jurisdiction in admitting evidence in respect of numbers eleven, thirteen, and twenty-five of the said claims, and in awarding in respect of the said claims; (2) That the costs of the said award awarded by the said arbitrators are excessive, and that the said arbitrators had no jurisdiction to award to themselves a specific sum. Mr. Willcocks had been the successful tenderer for the construction of the fourth section of the North Coast Railway, in length 20 miles, 4 chains, commencing at Yandina Station, 70 miles, 25 chains, from Brisbane, and ending at Cooran, 90 miles, 25 chains, in accordance with certain plans, sections, drawings, general conditions and specifications. An indenture of contract was signed by the parties on the twenty-first day of August, 1890. During the progress of the work, claims, disputes, and questions arose, and on the 7th December, 1891, the contractor

wrote to the Chief Engineer of the Railway Department, giving notice of his intention to have the matter in dispute referred to arbitration, in accordance with clause 54 of general conditions, withdrawing certain offers made by him, and naming his arbitrator. Clause 54 is as follows:

"Whenever it is intended by either of the parties to this contract to require any matter to be referred to arbitration as aforesaid such party shall within one month after failure to settle the claim dispute or question as hereinbefore provided give notice to the other party to appoint an arbitrator and the arbitrators shall thereupon be duly appointed and shall proceed to hear and determine the matter forthwith. Provided that the parties may agree in writing to let the appointment of the arbitrators and determination of the matter stand over to some future specified time. In default of such notice the party so making default shall not be entitled to require such claim dispute or question to be referred to arbitration."

Two lists of claims were enclosed with this letter. The first containing 39 items amounting to £16,217 5s. 6d., of which No. 11 was for £1,594 1s. 6d.—extra for slips in cuttings; No. 13 for £2000, a claim on account of a box-drain shown on the plan and section of cutting number thirty-nine having been dispensed with; also in consequence of the contractor having been ordered to sort certain material from cutting number thirty-nine, which he was ordered to put in bank number fifty-one; also for removing material excavated from cutting number thirty-nine to a distance of more than 40 chains; and further, for delay by the Railway Commissioners in setting a diversion for the purpose of carrying off water and preventing it accumulating in cutting number thirty-nine; and No. 25, a claim for £5,886 3s., for delay at cutting number thirty, caused through delay in supplying over-bridge plans and losses contingent upon same. The second list contained three extra items amounting to £399 12s. 10d. In reply to this letter the secretary to the Railway Commissioners wrote on the 24th December, 1891, naming their arbitrator, and objecting to the right or power of the arbitrators to hear, determine, or make any award concerning certain claims. On the 1st March, 1892, the arbitrators appointed wrote to the Crown Solicitor acting for the Railway Commissioners, and named a third arbitrator

to act with them. The three arbitrators sat and acted in the said reference, and heard evidence adduced by the parties to the reference on the 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, and 18th days of March, 1892. On the 21st day of March the arbitrators visited and inspected the works in respect of which the claims were made. On the 28th day of March the arbitrators published their award, disallowing certain claims and awarding and directing that the Railway Commissioners pay to the contractor the sum of £7,401 3s. 9d., in full satisfaction and discharge of all the claims, disputes, and differences arising between the parties on this matter. It was further awarded and directed that the Railway Commissioners should pay the costs of the reference, amounting to £1,731 7s. 2d., and that the costs of the award amounting to £1,921, be paid by the Commissioners. At the hearing it was objected on behalf of the Railway Commissioners in respect of claim No. 11, that the arbitrators had no jurisdiction to make any award thereon on grounds arising from the evidence. In respect of claim No. 13, it was objected that the claim was not referred to the arbitrators, inasmuch as no such claim was ever made to the Chief Engineer, except such part thereof as refers to the extra costs of cutting number thirty-nine, on account of not putting in the box-drain shown on the section, and not cutting an outlet from same. In respect of claim No. 25, it was similarly objected that the claim had not been referred to the arbitrators. On each of these claims it was requested on behalf of the Railway Commissioners that the arbitrators would keep their award separate, which was not done.

The submission to arbitration was made a rule of Court on the 2nd April, 1892, and on the 5th April, 1892, an order *nisi* on the grounds before stated was obtained from the Registrar.

Sir S. W. Griffith, Q.C., A.G., and Mansfield, for the Queensland Railway Commissioners, to move absolute the order *nisi*.

Rutledge, and Lilley, for G. C. Willcocks, to show cause.

Rutledge: As to the second ground—the ex-

cessive costs of the award—the arbitrators' fees and costs, amounting to £1,921, are not excessive. In the arbitration case in New South Wales, *O'Rourke and McSharry v. The Government of New South Wales*, the charges were five guineas a day from the date of the appointment of each arbitrator, and fifteen guineas a day during the hearing. The arbitrators in the present case had awarded themselves on the same scale. As to the power of the arbitrators to award themselves a sum for costs, it was admitted that they had no such power unless it was conferred upon them by the two parties. In the present case the arbitrators were given that power by the parties, and they have exercised it by awarding the costs in a lump sum. With reference to the excess of jurisdiction, attention was drawn to sections 52, 58, and 60 of the general conditions of the contract. The arbitrators' contention is that claims 11, 13, and 25 were provided for in clause 52, and that clause 58, in the event of arbitration, made the decision of the arbitrators final, and provided that it should not be set aside on account of any technical defect. Clause 58 is as follows:—

“ All decisions orders and awards of the arbitrators or any two of them as the case may be under any part of the contract shall be binding and conclusive upon the commissioners and the contractor shall perform abide by and submit to the same and the same shall not be set aside on account of any technical defects therein or in the specifications or the schedule of quantities and rates or in the drawings or any other part of this contract or on account of any informality omission delay or error of proceeding in or about the same or any of them or in relation thereto or on any other like ground and it shall not be competent except as hereinbefore provided for the contractor or the commissioners to object to any hearing before the determination of the arbitrators on the ground of any want of jurisdiction or excess of authority or irregularity of proceeding or otherwise howsoever but any and all matters made the subject of any such hearing or determination or decision and whether of retrospective or prospective operation or effect shall except as aforesaid be held and deemed to have been properly submitted to the arbitrators and be taken to have been properly adjudicated upon.”

This really was an appeal from the findings of the arbitrators' court, on the ground that the arbitrators had decided matters which were not submitted to them. The arbitrators were the judges of the matters which were submitted to them, and

having given their decision upon such matters it could not be set aside. As to notice being given of the submission of the matters disputed, the notice was contained in a letter written by the contractor under date of 11th April, 1891. [HARDING, J.: It has been held that an award cannot be set aside by the Court because it is erroneous on any point of law, neither can the Court go into questions of fact, nor decide on the merits of the evidence.] A similar principle was laid down in the case of *James v. James*, 22 Q.B.D., p. 674. [LILLEY, C.J.: That was the old principle. The contractor chose his tribunal, and if the arbitrators went wrong it was his lookout. Otherwise the Court would have to try all these arbitrations over again.] The case of *Hodgkinson v. Fernie*, 27 L.J., C.P., p. 66, bears on the same question. [LILLEY, C.J.: I understand that the question at issue is whether there was any reference of the matters to the arbitrators for decision. They could not award on matters not submitted to them.] The matters were submitted to the arbitrators, and their decision having been given, cannot be disturbed.

Lilley: Under the terms of the contract the arbitrators were the judges of the law and the facts, and their decision cannot be set aside on any technical or legal defect. Claims 11, 13, and 25 were rightly adjudicated upon by the arbitrators. The real question at issue is whether the parties had agreed that the arbitrators should fix their own fees and embody them with the award in a lump sum. It is submitted that the parties had so agreed, and that being so their award cannot be set aside, and the rule should be refused.

Sir S. W. Griffith, Q.C., A.G., quoted the case of *In re Coombs*, 4 Exch., p. 839, on the question of the jurisdiction of arbitrators to fix their own fees. By that case the arbitrators had no power to fix their own costs. In this case the arbitrators had apparently awarded themselves £600 apiece, say for twenty days' work. They reduced it by £196 which they said they paid for shorthand writers' fees, but that still left

their costs excessive. One of the arbitrators (Mr. Watkins) claimed £5 a day for three months that he spent in Brisbane after his appointment, and before the case came on. On the question of jurisdiction attention is called to the claims which it is contended are outside the arbitrators' jurisdiction. It is not disputed that they were the absolute judges of the law and the facts so long as they had jurisdiction to inquire at all. If they had the foundation they could decide anything they liked, and the Court would not inquire into it. The Court sometimes inquired into arbitrators' decisions in a different way, and then might revoke the arbitration if it were utterly unreasonable. But the Court would inquire into the facts giving jurisdiction. [HARDING, J.: Not if the submission is that the arbitrators are to decide all matters in dispute, and what matters are in dispute.] If such a principle were admitted an arbitrator would be able to decide whatever he liked. He would be an absolute despot, and could sit and make any order he liked against the parties. The contract did not contain a reference enabling the arbitrators to do what they liked. Their jurisdiction was very carefully hedged round. [REAL, J.: How is the Court to ascertain what is in the jurisdiction of the arbitrators?] By evidence and preliminary matters. [REAL, J.: If the arbitrators are appointed by the contract the persons to construe that contract, can we do anything more than inquire whether the thing they have decided was included in it?] The arbitrators were not appointed to construe the contract as to the matters in their jurisdiction. It would be a very extraordinary thing if they were. That conclusion could only be arrived at by rejecting all the clauses relating to the arbitration except clause 52. That was not the ordinary way to construe conditions. Clauses 51, 54, and 56, all expressly excluded the jurisdiction of the arbitrators in certain cases. Unless these conditions were rejected altogether it was impossible to hold that the arbitrators had power under clause 52, and say that they had jurisdiction. All those three claims were within clauses 51, 54, and 56.

The question of jurisdiction must be determined by the Court, and not by the arbitrators, and it could only be determined by the facts. [REAL, J.: The claim for delay comes under clause 50, which sets out that the claim is referable to arbitration one month after failure to settle. Would not this clause constitute the arbitrators the persons to decide what constitutes a failure?] First of all an application had to be made in writing for extension of time and compensation. [HARDING, J.: Is it conceded that claims 11, 13, and 25 were within time before the arbitrators as questions for their consideration?] Certainly not. [HARDING, J.: Supposing that these three points were brought before the arbitrators in time, objection might be taken that they were already blocked by section 42 by reason of the Chief Engineer not having dealt with them, and then it would be a question for the arbitrators to decide whether or not it was a question that the Chief Engineer should have decided, or whether he had actually decided it.] It comes to this, that no matter what the arbitrators did they would be perfectly right, and there would be no remedy. [HARDING, J.: Can you get out of the circle?] There were no arbitrators unless the conditions of clause 54 were complied with. The submission by the Commissioners was of two matters that fell within the conditions prescribed by clause 54, but beyond those two matters there was no submission to arbitration by the Commissioners. [HARDING, J.: What I want to know is this. Supposing that a dispute existed, were the arbitrators appointed within a month of that dispute?] It was true that within a month before the appointment of the arbitrators, the contractor made these claims. But then their conditions said that no such claims should be made, and if they were made should not be decided. [HARDING, J.: But having appointed their arbitrators, the arbitrators might say we will also decide this matter before us.] The jurisdiction of the arbitrators would depend upon extraneous facts which were to be decided by the Court. The arbitrators could not by any finding of their own give themselves jurisdiction. The Court must really ascertain

what happened prior to the admitted reference being made. Under the conditions the arbitrators had no jurisdiction unless the facts really existed and were proved to the Court upon being challenged. The conditions precedent to arbitration on these matters were, that the claims should be made within one month, and if not settled within two months, notice should be given of the appointment of the arbitrator. The matter could not be kept hanging on until the end of the contract. Delay was not a breach of contract in respect to the conditions. Those three claims were included on the contractor's notice, but the Commissioners informed him that he was not entitled to refer them to arbitration, and they would object to the arbitrators deciding them. As the arbitrators had found on these claims, their finding was irrelevant, because they had no jurisdiction. The facts did not exist which made these matters properly referable to arbitration. Of course, if the arbitrators' court was the tribunal to decide whether such facts existed, he was out of court. [LILLEY, C.J.: A very stringent instrument has been prepared for binding the contractor, and the question is, are not you bound by it too?] We claim that we are bound by it. [LILLEY, C.J.: Having bound the arbitrator to absolutely submit to the decision of the arbitrators, is it not that you wish to avoid being bound by it as well?] No; we do not. [LILLEY, C.J.: If the matter referable is really left to the arbitrators, under the conditions of this instrument you will be bound by it.] Certainly. The Railway Commissioners expressly contracted that the arbitrators were not to determine what was referable to them. The contractor had contracted that, if he wanted to make claims of this sort he had to give certain notice, and if he neglected to do so he was to be deemed to have waived his claims. [HARDING, J.: You appoint an artificial judge to decide it.] No; we say that the Supreme Court of Queensland shall decide it, not the arbitrators. [LILLEY, C.J.: Would not they have to decide what matters were proper for the Chief Engineer to decide?] In one sense they would have to decide that before they could go on

with their work, but their decision would not be binding on anybody. Subordinate courts may determine matters of jurisdiction, but their decision is not binding. The matters involved in these claims were not included in the submission, inasmuch as the conditions had not been complied with, which would have brought them within the jurisdiction of the arbitrators. In deciding them the arbitrators had exceeded their jurisdiction, and that the rule on both grounds should be made absolute.

C.A.V.

HARDING, J.: This is a motion by the Attorney-General to make absolute a rule *nisi* obtained by him on behalf of the Queensland Railway Commissioners on 5th April last, calling on George Charles Willcocks to show cause at the sitting of this Court, holden on 3rd May last, why the award made by the arbitrators on the submission to arbitration between him and the Commissioners in respect of certain claims preferred by him against the Commissioners should not be set aside on the grounds:—(1) That the arbitrators exceeded their jurisdiction in admitting evidence in support of Nos. 11, 13, and 25 of the said claims, and awarding in respect of the same; (2) that the costs of the award awarded by the arbitrators are excessive, and that the arbitrators had no jurisdiction to award themselves a specific sum. Claims No. 11, 13, and 25 were for work described, as No. 11, extra for slips in cuttings; No. 13, extra cost of cutting; No. 39, on account of not putting in box-drain shown on section, and not cutting outlet from same, sorting material for bank 51 as per instructions, extra lead as per instructions, extra cost of cutting in consequence of delay in cutting out a diversion; No. 25, delay at cutting 30 caused by delay in supplying over-bridge plans, and losses (3) contingent upon same. The arbitrators allowed something in respect of each of such claims, and such allowances formed part of a lump sum awarded. The sum awarded by the arbitrators is specific, and ascertained on the face of the award. George Charles Willcocks was the contractor under an indenture of contract with

the Queensland Railway Commissioners, for the construction of section 4 of the North Coast Railway in Queensland, dated the 21st day of August, 1890. The indenture and the documents thereunto annexed have been made a rule of Court by order dated the 2nd April. Claims, disputes, and questions in connection with the construction of the said railway arose between the said contractor and the Queensland Railway Commissioners. The matters in dispute were referred under clauses 52 and 54 of the general conditions, being one of the documents annexed to the indenture of contract. As to No. 11, it was contended that it was either work provided for at a fixed rate or it was not. If it was not the 17th condition applied. It was also contended that condition 36 applied. It is for the purposes of this judgment unnecessary to go further into the facts. The question on Nos. 11, 13, and 25 is whether the arbitrators had power to decide on their own jurisdiction to entertain them. The conditions which I have referred to simply provide that want of jurisdiction, excess of authority, or irregularity of proceeding on the part of the arbitrators, shall not form a good ground for objecting to their determination. It appears to me that the true construction of this submission is that the parties, by submitting to the referee, took the arbitrators with their law, good or bad, for better or worse. (*James v. James*, 22 Q.B.D., pp. 669 and 674, affirmed on appeal, 23 Q.B.D., 12). Adopting the language of Justice Crowder in *Hodgkinson v. Fernie and another*, 27 L.J., C.P., p. 66, at p. 68, the award is good on the face of it. He says: "The general rule is clear that, where the award is good on the face of it, the Court will not set it aside for any error of the arbitrator in law or fact. The parties are taken to have chosen their own judge, and to be bound by his decision. It is said that that principle does not apply here, and that the parties are not to be taken as having chosen the arbitrator to decide this question. I think that is a fallacy, for they chose him to decide the question of damages." There remains the second ground to be disposed

of. I think that the costs awarded by the arbitrators are excessive. On the ground that the arbitrators had no jurisdiction to award themselves a specific sum, a number of authorities were quoted: Justice Erle, in *Roberts v. Eberhardt*, 28 L.J., C.P., 74, at p. 78, says: "The arbitrator cannot judicially decide to the amount of his own fee, whether he specifies it in his award or demands it orally from the parties." *Re Coombs*, 4 Ex., 839, is to the same effect. *Rose v. Redfern*, 10 W.R., 91, only goes to show that, where the amount has not been shown to be excessive, it is no ground for setting aside or sending back; and *Threlfall v. Fanshawe*, 19 L.J., Q.B., 334, was quoted as showing a different rule, but that case has been doubted in *Parkinson v. Smith*, 30 L.J., Q.B., 178, and I think rightly so. On this ground I think the rule must be made absolute as to the £1,921 awarded by the arbitrators to themselves. This can be done without interfering with the rest of the award. The rest of the rule must be discharged. There will be no costs on either side.

REAL, J.: I am of the same opinion, but I wish to point out that it was conceded in the argument that an error in fact or law made by the arbitrators on a matter within the provision of the submission would be no ground for setting aside their award. Consequently the duty imposed upon us was to look at the terms of the submission, and inquire whether in the terms of that submission the acts complained of by the defendants were referred to the judgment of the arbitrators. It is sometimes somewhat difficult to distinguish between what has been decided within the submission and what has not, but in this case I find no difficulty in coming to the conclusion that the matters decided by the arbitrators were all matters referred to their decision by the terms of this submission. Condition 52 specially provides that these matters shall be left to the decision of the arbitrators. They are all specifically mentioned; value of the works, hindrance, delay, or impediment, and whether works are included in this contract or not. Then it was contended by the defendants that condition 50 had provided that these matters

would not go to arbitration unless certain acts had been done before the time of arbitration, and had been done within specified times from the arising of the causes of complaint. Now, the first question we have to consider is: Who is to be the judge of the fact whether or not these conditions have been complied with? It appears to me, looking at the whole of this submission—and I take this submission to be covered by the whole of the contract, from the letter specifying the particulars that they required the decision of the arbitrators on, and probably covered by the letter of the Commissioners in answer to that in which they say they will raise the question whether the right of the arbitrators to decide that claim 25 had arisen, or in other words, whether the conditions that they allege had been complied with—that the question whether the right of the arbitrators had arisen depended upon two things. First, it depended upon the construction put upon the contract. I don't say it is open to two constructions, but possibly the arbitrators may have adopted a wrong construction. If we came to the conclusion that they were wrong in law, still the parties specially chose them, and by condition 58 the award is not to be set aside for any irregularity or want of jurisdiction. It appears to me that the only thing the Court can do is to look at the submission and see whether it is sufficiently wide to enable the claim to be made. If on examining that document we come to the conclusion that upon a certain state of facts existing the arbitrators would have the right to decide these questions, it appears to me that the parties have appointed the arbitrators as judges of the existence or not of these facts. For that reason I have come to the conclusion that the whole of the questions in this case were submitted to the arbitrators, and therefore we are precluded on an application of this nature from discussing the question whether they were right or wrong. The parties were bound by what they did, whether it was right or wrong. The terms of this submission seem to me large enough to cover these claims, and I have come to the conclusion that the award

must be sustained so far as it relates to the matter claimed. I have also come to the conclusion that the arbitrators cannot award themselves a specific sum because they cannot be judges in their own cause, and each party having failed in part, each party must pay its own costs.

LILLEY, C.J., said: I agree with the judgment delivered so far as the result is concerned, and I have nothing to add to the reasons already given by my brother judges. Judgment will be in accordance with the terms laid down by both of the judges.

Solicitors for Railway Commissioners: *J Howard Gill*.

Solicitor for Willcocks: *Winter*.

VON DOHREN v. MURRAY AND OTHERS.

By-law — Ultra vires — Hawker's license — The Local Government Act of 1878 (42 Vic., No. 8), ss. 167, 248 — Hawkers and Pedlars Act of 1849 (13 Vic., No. 36), s. 23 — 48 Vic., No. 15, s. 2 — 50 Vic., No. 23, s. 2, sub. 5.

The Municipal Council of Brisbane made a by-law enacting that no person should sell or expose for sale, except in the house, shop, or premises of the person so selling, any farm produce or vegetables, except under a license authorising him to do so.

Von Dohren was convicted of selling vegetables in George Street, Brisbane, without a license.

Held, that the by-law could not be construed to authorise the imposition of license fees for the use of the roads, and was not directed to the regulation of the market, and so was *ultra vires*. Conviction quashed.

MOTION to make absolute a rule *nisi* quashing the conviction of a hawker named Von Dohren, for a breach of municipal by-law No. 42, with regard to hawking in the streets.

Sir S. W. Griffith, Q.C., A.G., and Frez, for the Municipal Council of Brisbane, respondents; *Lilley*, and *Conlan*, for appellant.

Lilley: Von Dohren was convicted on a charge of having unlawfully sold vegetables in George Street. On 11th May he was in George Street, Brisbane. The municipal inspector went up to him and examined the contents of his cart, and saw in it onions, potatoes, and other things. On

being questioned by the officer, Von Dohren admitted that he was exposing these goods for sale, and said, "I am a *bond fide* hawker, but I refuse to take out a license on principle." He was thereupon charged with having infringed by-law No. 42, and was brought up at the Police Court and fined. This by-law, which was proclaimed on 19th December, 1885, was as follows:—

"No person shall sell, offer, or expose for sale, except in the house, shop, or premises of the person so selling, offering, or exposing for sale, or in the aforesaid market, any farm, garden, or plantation produce, or any vegetables, fruit, green fodder, bacon, cheese, butter, eggs, poultry, tripe, pastry, ice cream, or other articles intended for consumption, or any other things such as are or may be sold, or offered for sale in the said market, except under a license authorising such person to do so, signed by the lessee or clerk of the said market, and every such license shall be numbered and registered, and shall be in the form contained in the schedule hereto, and shall be in force for the term therein stated and no longer."

This clearly did not come within the 167th section of *The Local Government Act of 1878*, which empowered local authorities to make by-laws. At the end of the section it was enacted, "But no such by-law shall contain matter contrary to this Act, or any other law in force in Queensland." The 23rd section of *The Hawkers Act*, which gave the definition of hawkers, contained the proviso "that nothing contained in this Act shall be construed to prevent any person from selling or offering for sale any printed newspapers, any fish, fruit, water, fuel, milk, vegetables, or victuals of any description, or any agricultural produce, in any such city, town, street, road, or place, without having previously obtained any such license as aforesaid, nor to prevent the actual maker, or the children, apprentices, agents, or servants of, and residing with, the maker of any goods, from selling or offering for sale the same in any such city, town, street, road, or place, without having previously obtained a license as aforesaid, nor to prevent the sale without such license, of any goods whatever, in any market or fair legally established in the colony, or in any house or shop occupied by the person so selling or offering to sell the same." The contention for Von Dohren was that hawkers came within this exception as persons

carrying about for sale, in the city of Brisbane, vegetables or agricultural produce. In attempting to bind hawkers by this by-law the council were trying virtually to repeal this section. The by-law was *ultra vires*, and the conviction should be quashed.

The Attorney-General: The question of Von Dohren being a hawker does not come within the by-law, and the question of *The Hawkers Act* is entirely irrelevant. The Act said that nothing in this Act should be construed to prevent a person doing so and so. [HARDING, J.: If it had not been for that, they could have trotted their goods about as they liked.] Certainly; but the question is whether the municipality had power to make it unlawful. Previously it was lawful, and the Act practically left the rights of hawkers as they were, so far as this section was concerned. [CHUBB, J.: Under that Act a man did not require a license to sell vegetables.] The question is whether there was any other authority which could compel them to take out licenses. This Act was passed in restraint of the common law, but it did not restrain common law so far as the things specified were concerned. Since that the by-law had been passed, and the question was whether the imposition of licenses by it was lawful. All by-laws necessarily imposed a duty or restricted a liberty. The only question was whether they were within the powers conferred by law. Section 248 of *The Local Government Act* provided, "the council may establish tolls, rates, and dues, upon any market, bridge, ferry, wharf, or jetty, belonging to the municipality, and erect toll-gates, toll-bars, or other works necessary for the collection of such tolls, rates, and dues, and may make by-laws for the proper collection and management of such tolls, rates, and dues." Upon that there was the decision of Mr. Justice Harding in June, 1887, in the case of *Reid v. The Municipality of Brisbane*. (*Courier Reports*, vol. 16, p. 84.) The *Act of 1886* gave the municipality express power to establish markets. It was submitted that under the Statute this by-law was not *ultra vires*,

and there were two Acts which were material to that contention—namely, the *Acts of 1884 and 1886*. Section 2 of the *Act of 1884* provided that every local authority was authorised by by-law to impose, collect, receive, and retain reasonable tolls, rates, and dues, for the use of roads, bridges, wharves, jetties, or markets, under the control of the local authority. [REAL, J.: Must not the toll be general? Could you impose a toll on particular persons because they carry vegetables in a cart?] Yes, if the person occupied the street for the purposes of a stand to sell his vegetables. The authority was to impose dues and rates for the use of the roads. [HARDING, J.: But here they have made a by-law affecting persons selling in the streets. LILLEY, C.J.: You want a Hawkers' Act. REAL, J.: They could impose a by-law which would apply to you in your carriage.] The circumstances under which business is done in towns has to be considered. Persons carry on business in shops, and every person who had a shop must necessarily pay rates to the municipality for the protection the municipality gave him, and the advantage he got from selling where persons were collected together. Other persons came in and sought to exercise the same privilege in the streets and did not pay anything. [REAL, J.: You have to pay the same rate whether you occupy a shop or not.] The hawkers desired to carry on their business and pay no rates. [REAL, J.: Looking at the words of the by-law, it means imposing a duty on a man merely for the use of a road in consequence of his trade.] There is authority to make by-laws relating to the use of roads, but they need not be made applicable to everybody who used the roads. Such by-laws might be made to apply to persons whose use of the roads interfered with others. The words of the Statute are: "establishing and regulating markets, and imposing market dues." The local authority had the power to impose a due for the use of the roads for any specified purpose. If a due might be imposed for the use of the road they might impose a due for the use of the road for a special purpose. They were not bound to

impose a due for the use of the road by everybody. Then there was subsection 5, section 2, of the *Act of 1886* which gave the council power to make by-laws for "establishing and regulating markets, and imposing market dues." [LILLEY, C.J.: Your by-law does not profess to do anything of the kind. It is a restriction of the common law right of selling where you like.] The by-law might be *ultra vires* except so far as it related to the use of streets. The words relied upon are: "dues for the use of roads." If a man sold in a street he surely used the street for the purpose of selling. So far as he used the road it would clearly come under section 2. [LILLEY, C.J.: I very much doubt that. It might prevent a man selling in the street anything that was in a garden a hundred miles away.] The by-law did not apply to such a case. It applied to persons who carried on business in the street. The authority given to regulate and establish markets was also relied on. If the council were authorised to establish and regulate markets, they had by implication the authority to prohibit the disturbance of such markets. That was shown in the cases of *Bridgland v. Shapter*, 4 M. & W., 375, *The Mayor of Dorchester v. Ensor*, L.R., 4 Exch. p. 335, and *Goldsmid v. G. E. Railway Co.*, 9 Ap. Ca., 927. [LILLEY, C.J.: It seems to me that the by-law is rather for the regulation of men than markets. COOPER, J.: You say hawking is one of the things that disturbed the market? LILLEY, C.J.: I should read this by-law as a protection to the shopkeepers of Brisbane. There is no particular district assigned. The only thing mentioned is Roma Street. So far as this by-law is concerned, it is a prohibition against selling anything anywhere in creation. It is not limited to shops. It is a general prohibition against all mankind.] The Legislature in its enactments did not define that a man should not do anything in the boundaries of Queensland.

LILLEY, C.J.: It is clear that this by-law, which professes to be made for preventing hawking in the streets of the Municipality of Brisbane, of such things as might be sold in the public market

in Roma Street, cannot by any possible construction be held to be a by-law to authorise the imposition of license fees for the use of the roads. The use of a road is an expression thoroughly understood to mean passing along for ordinary traffic. The Statute upon which the Attorney-General fell back to make such a by-law was first the Act of 1878, *The Municipality Principal Act*. But this by-law is really intended to impose license fees on hawkers, and for regulating a market. It is a prohibition extending over the whole of the municipality against any person selling, offering, or exposing for sale, except in a house, shop, or authorised market, any farm produce or vegetables. Well, that is a personal prohibition, and is in no way directed to the regulation of the market. Even assuming for the moment that it does not apply to the regulation of the market, it cannot be said that selling in George Street is a disturbance of the market established in Roma Street. If it were, the remedy would be by way of an action for damages, if it could be shown that any damage had been caused to the Roma Street market by the disturbance. The conviction seems entirely unsupported within the four corners of the by-law, and I must hold that the by-law was *ultra vires*. The rule must be made absolute, with costs.

HARDING, J.: I am of the same opinion.

REAL, COOPER, and CHUBB, JJ., concurred.

Rule absolute, with costs.

Solicitors for respondents: *Macpherson & Pees*.

Solicitor for appellant: *E. W. P. Goertz*.

WILKINS v. RIDLEY.

Ouster—Divisional Boards Act of 1887 (51 Vic., No. 7), ss. 26, 43—Time of nomination.

An objection was taken that a nomination paper for election was not entered before 4 o'clock as required by 51 Vic., No. 7, s. 43.

Held, that as the time in dispute was so short, the true time taken by observation of the sun must be shown before the Court could say the returning officer was wrong in receiving the nomination paper.

MOTION for a rule absolute to oust Thomas Ridley from the position of representative of No.

3 Subdivision of the Nundah Division, on the ground that his nomination paper was received by the returning officer after 4 o'clock. The respondent was the only candidate for Subdivision 3 at the last election in January last. This election was disputed by Charles Willis, a ratepayer, under section 26 of *The Divisional Boards Act*.

Gore Jones, for the relator; *G. W. Power*, for respondent.

Gore Jones: Section 43 of *The Divisional Boards Act of 1887* states that the nomination paper must be delivered before 4 o'clock. [REAL, J.: Is there any provision about what clock is to be used? All watches or clocks don't agree.] The clerk should keep the correct time at the Board office. [LILLEY, C.J.: Is he to take an observation every day to get the correct time?] No. There is a conflict of evidence about the time. Ridley was seen approaching the Board office at half-a-minute to 4 o'clock.

LILLEY, C.J.: You must prove the true time. As the time in dispute is so short, we think it necessary that the true time taken by observation of the sun should be shown before we can declare the returning officer was wrong in receiving the nomination paper. The relator has not shown the true time. The rule will therefore be discharged with costs.

Solicitor for relator: *Pritchard*.

Solicitor for respondent: *A. J. Thynne*.

THE QUEEN v. WALSH.

The Dividend Duty Act of 1890 (54 Vic., No. 10), ss. 8, 9—Mortgage—Assets—Advances made out of Queensland on property within Queensland.

The Union Mortgage and Agency Company, Limited, had its head office in London. Their local manager made a return setting out that the Company's average assets in Queensland for the year 1890 amounted to £22,000, while the other assets of the Company amounted to one million pounds sterling. The Company had advanced large sums to persons in and out of Queensland, on property in Queensland, at their offices in Victoria and New South Wales, and contended they were not liable to pay duty under *The Dividend Duty Act of 1890* on these advances.

Held, on demurrer, that the moneys advanced on these securities, real and personal, situated within Queensland, were assets within the meaning of *The Dividend Duty Act*, and that duty was payable on them under ss. 8 and 9. The term "assets" means property, wherever situated, used for the purpose of earning profit or dividend for the Company.

DEMURRER.

AN action had been commenced by information under *The Crown Remedies Act*, to recover a penalty for an alleged false return made by the defendant, the local manager of the Union Mortgage and Agency Company of Australia, Limited. The return set out that the average assets of the Company in Queensland for the year 1890 amounted to £22,000, while the other assets of the Company amounted to a million pounds sterling, and the Company contended that the latter was not liable to duty. The head office of the Company was at London. The Company advanced money to various persons, at their offices in Sydney and Melbourne, on property in Queensland. The Crown contended that these advances had to be taken into consideration in apportioning the amount of duty payable under ss. 8 and 9 of *The Dividend Duty Act*, and demurred to the statement of defence.

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Sydes, for the Crown. *Lilley and Bannatyne*, for the defendant.

Lilley: The case is settled by authority. An artificial meaning is given to capital by section 9. All the subscribed capital might be returned to the shareholders, and the Company might carry on business with its profits. The profits would form a fund which never came from the members at all. "Dividend" is defined in section 2. The Company took mortgages on securities in Queensland, but were not concerned whether the money came into Queensland or not. [REAL, J.: They are concerned where the mortgage is.] The defendant's contention is that while the mortgage remained as here in Victoria, the asset which it represented remained in Victoria. [CHUBB, J.: Do the Company lend on a piece of parchment, or on the security mentioned in it?] On the security.

The only question is: Where is the asset domiciled? It follows the lender, where the lender has the security. The asset cannot be in Victoria and Queensland at the same time. *Attorney-General v. Bouwens*, 4 M. & W., 171. When the Company made an advance they got a specialty debt in the shape of a mortgage or bond. [COOPER, J.: It is more than a specialty debt. That is a debt which may affect land when you get judgment, but a mortgage affects the land without judgment.] The debt is where the deed of mortgage is. *Commissioner of Stamps v. Hope*, 1891, A.C., 476. The asset is not within the jurisdiction of the Court. [REAL, J.: Is not the rule you refer to an artificial one confined to Probate? It arose from the practice of the Spiritual Courts, owing to the difficulty of saying what court a matter was in, and they laid down that it should be within the jurisdiction of the court within whose legal limits the document was found. It was a very convenient practice, but it should not be applied to the interpretation of a Statute passed in Queensland for entirely different purposes.] There cannot be one rule as to a specialty debt in one court, and a different rule in another court. In all the courts a specialty debt is held to live where the security is found. In the case of a contract debt, it follows the debtor wherever he goes. The moneys of this Company are repayable in Victoria, not here. [REAL, J.: Section 9 says "total assets of the company, wherever situate."] That refers to the return to be furnished. The advances were not made in Queensland at all. The securities are not assets in this colony within the meaning of the Act. [LILLEY, C.J.: The cases cited have all been Probate cases.] They are the only cases. [LILLEY, C.J.: It seems to me that, with regard to the realty, the register makes it a specialty. You would recover here, but it would be here so far as the realty is concerned. Mortgages here are only by register. The debt being domiciled here, it is a specialty on the register.] The asset is not an asset in Queensland, and is not, under section 8, capital employed in Queensland; it is in Victoria. The Act is not

distinct enough to bring these advances within the meaning of the word "asset."

Bannatyne: Every mortgage in use in the colonies is divisible into two parts—a covenant to pay and the charge or assignment, according as it is real or personal property. As between the mortgagor and the mortgagee the covenant to pay was the asset, and the charge or assignment merely the means of realising that asset in the event of the covenant to pay not being punctually carried out. It was not alleged in the information that any of the mortgagors were in default, or that the mortgagees had any right to enter upon or take possession of the properties mortgaged, so that all that was held by them was a mere covenant to pay. The covenants in the mortgages were to pay principal and interest outside the colony, and the mortgagors would have to be sued there. The mortgages were not, therefore, assets within the meaning of the Act. The mortgages themselves were personal, not real, property, and the mortgages, apart from their being specialties, were not assets in this colony, on the principle *mobilia sequuntur personam*.

Sir S. W. Griffith: It is not necessary to have recourse to any old rules of the Probate Court for the purpose of deciding on the construction of this Statute. The words "capital" and "assets" are not technical terms, but terms in common use. The term "assets," speaking in Queensland, must have the same meaning as speaking of their assets wherever they are. When a piece of land in Queensland is mortgaged, has the Company no property on it in Queensland? It is a well-known rule that a charge on land is an immovable thing. As to stock mortgages, when stock is assigned by deed of mortgage, can it be said that the mortgagee has no property in the stock? If the mortgagor sold that property, representing it to be his own, he would be liable to be convicted for obtaining money by false pretences. If it was not the property of the mortgagor or the mortgagee, whose was it? [LILLEY, C.J.: The property, if sold, would go to pay debts.] Therefore it was part of the assets of the Company. Where was it part of

the assets if not in Queensland? [LILLEY, C.J.: They argue that it is wherever the piece of paper travels to.] That argument proves too much. It proves that the mortgage did not exist at all; because, according to that argument, it certainly does not exist here.

LILLEY, C.J.: I do not think the Attorney-General need labour the matter. The sole question—the one question arising under these two sections of *The Dividend Duty Act*—is whether these real and personal securities of the Company, situated in Queensland, are assets of the Company within the meaning of the particular Statute. I do not think it is necessary to go over the technical construction of assets under the probate laws, either of Great Britain or of the colonies. I am content to rest my judgment on the natural construction of these sections. This is a Company lending money in Queensland (and it may lend money wherever it likes); but if it wished at any time, upon default of payment, to realise money that it had lent, or if its creditors desired to realise for the purpose of paying debts due by them, the Company or its creditors must go to the particular country in which the substantial security for the debt was situated. It is admitted on the pleadings that this Company's substantial securities are all situated in the colony of Queensland, and there is no dispute that those securities are assets of the Company. If this Company should at any time become insolvent, and if the creditors, speaking in the ordinary language of trade and business, were looking about for its assets, they would regard the sheep and cattle, and lands mortgaged to them within the colony of Queensland, as assets available for the payment of their debts. It seems to me that that is the natural construction, and it is not necessary to import any artificial construction. It is admitted that it is a purely artificial construction of the Court of Probate, that wherever a deed was found, there the specialty existed. It will be straining the language of this Act if we are to hold that wherever this Company chose to carry its deeds—say from Victoria to London, from London to Paris, or to any other part of the

world—there the assets of the Company would be situated. No man of business, probably no lawyer, would hold that for the purposes of an Act framed in the manner in which this *Dividend Duty Act* has been, the assets of the Company were either in London or in Paris. They are substantially here. I take it that assets means property wherever situated, especially if situated in Queensland, as in this case, used for the purpose of earning the profit or dividend of the Company. It seems to me that is the whole question, and I am content to rest upon the natural construction of the Statute.

HANDING, J.: I do not see why we need go outside the language of the Statute. I agree with the construction put upon it by The Chief Justice.

COOPER, J.: I am of the same opinion for the same reasons.

CHUBB, J., and REAL, J., concurred.

Demurrer allowed accordingly, with costs.

Solicitor for Crown: *J. Howard Gill*.

Solicitors for defendant: *Hart & Flower*.

BRITISH AND AUSTRALASIAN TRUST AND LOAN CO.
LIMITED v. MCCARTHY.

Masters and Servants Act of 1861 (25 Vic., No. 11), s. 9—The Wages Act of 1870 (34 Vic., No. 16), ss. 2, 7—Mortgagee—Warrant of distress—Notice to mortgagee before lodging warrant.

Plaintiffs were mortgagees of land owned by L. Defendant, a labourer employed by L., sued and obtained a judgment for £15 ls. against him for wages. Execution was issued and lodged with the Registrar of Titles, as the judgment was unsatisfied. Plaintiffs took possession of the lands on 1st October, 1891, after the execution, and received no notice of the execution until after the warrant had been lodged, except that in April, 1891, a general demand for wages was made on them. Defendant threatened to sell the land under the warrant for execution.

Held, (Real, J., dissentiente) that if the work in respect of which the judgment was obtained was done upon the mortgaged land, the defendant was not entitled to lodge the warrant of distress with the Registrar of Titles, without first calling upon the plaintiff to show cause why it should not be so lodged, or otherwise making them parties to the proceedings before

the justices, before the warrant of distress was executed against the mortgaged land.

SPECIAL CASE.

The plaintiff Company were mortgagees of certain land owned by Patrick Lillis. The latter was the proprietor of 19,274 acres of land known as Woolooga Station, and 8000 acres of it was mortgaged to the plaintiff Company. The defendant was a labourer employed by Lillis, and he had sued and obtained execution against him for £15 1s. 6d. due for wages. On or about July, 1891, Messrs. B. D. Morehead & Co., acting for and on behalf of the plaintiffs as mortgagees, advertised these lands, and others, for sale at Brisbane. On the 14th of the month they offered the lands, with other lands, at public auction, but there being no bid, no sale was effected. On the 1st October, 1891, the plaintiffs entered upon and took possession of the lands as mortgagees. On the 12th August the defendant brought his action against Lillis to recover the wages due to him, and a verdict, as stated, was given in his favour. The judgment not being satisfied, execution was issued and lodged with the Registrar of Titles at Brisbane. The plaintiffs, who did not take possession until after the execution, were never made a party to the proceedings, and they received no notice of them until after the warrant of execution had been lodged, except that in April, 1891, a general demand for payment of wages due to defendant and others for work done on Woolooga was made upon them. In September, 1891, the defendant threatened to proceed to sell the lands in which plaintiffs were interested under the warrant for execution. The question submitted for the opinion of the Court was whether under the circumstances the defendant was entitled to execute that warrant by selling or otherwise dealing with the interest of the plaintiffs in the mortgaged land without proper notice being given to them, and without their being heard. As they had received no such notice, and had had no opportunity of defending their interest, it was maintained that the defendant could not execute his warrant upon the property which they had taken possession of.

The Court held that, before the question of notice could be decided, it would be necessary to show whether or not the work done by the defendant was done on the mortgaged land. That had not been shown, and it was incumbent on the defendant to prove that before the question of notice could arise. They therefore gave defendant leave to amend the statement of the case generally.

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Jodrell, for plaintiffs; MacDonnell, for defendant.

The Attorney-General: The plaintiffs as mortgagees were entitled to notice of the judgment before the execution was enforced, so that they might be heard. They received notice of the proceedings, but the defendant seized the property without notifying them of his intention to enforce execution. The point raised has been decided in *Ex parte Duxberry*, 2 S.C.R., (N.S.W.) 230. Notice was also required in the following cases:—*Rex v. Benn*, 6 Term R., 198; *Harper v. Carr*, 7 Term R., 270; *Rex v. Gaskin*, 8 Term R., 209; *Capel v. Child*, 2 C. & J., 558; *Queen v. Archbishop of Canterbury*, 28 L.J., Q.B. 154; *Cooper v. Wandsworth*, 32 L.J., C.P. 185; *Rex v. Chancellor of Cambridge*, 1 Strange, 557. The rules in interpretation of Statutes are explained in *The Queen v. The Judge of the City of London Court*, (1892) 1 Q.B., 273.

MacDonnell referred to section 9 of *The Masters and Servants Act of 1861*. No notice is required to be given to the mortgagee either by section 2 or section 7 of *The Wages Act of 1870*. There is an omission in the Act.

LILLEY, C.J.: This was an action against the mortgagor, and the proceedings were before the magistrate for the recovery of wages. It is admitted that the mortgagee was no party to the proceedings, which went so far as judgment and the issue of a distress warrant. There is no evidence whatever to show that the mortgagee had any knowledge of the actual proceedings. There was some application before they commenced, but the proceedings were really between the servant

and the mortgagor who was his employer. There is no doubt of the right to issue a distress warrant against the goods and chattels and lands, at all events against the goods and chattels of the mortgagor, but in this case an attempt has been made to extend the power of distress over not only the mortgagor's lands and interests, but over the interest in them of the mortgagee, and that without giving him any notice. The first question raised under this special case is whether the defendant is entitled to execute such a warrant of distress without first calling upon the plaintiffs, who were the mortgagees, to show cause why it should not be so allowed, or why they otherwise should not be made parties to the proceedings before the justices before the warrant of distress was executed against the mortgaged land. That is all we have to answer. There is no doubt, and it cannot be disputed for a single moment, that before the land or liberty of a man can be affected, and before his goods can be seized by legal process, he must first be heard. That is the old rule, not only of law but of natural justice. In this case the mortgagees have not been heard, and it is contended that the law itself has provided that without being heard, and without being any party to the proceedings, a warrant for execution may be enforced on their land. I must say that unless I see that written in very large letters in the Statute, I cannot hold that the Legislature intended that there should be such a departure from the rule of natural justice. It is clear that under any interpretation of the law a man must be heard. I cannot in any way see that the Legislature intended to exclude that rule, alike of reason, of natural justice, and of law. I think, therefore, that the answer to the first question must be in the negative.

HARDING, J.: I have heard nothing in the argument which went to show that the Statute clearly, or even obscurely, took away the right of every member of the community to be heard in a court of justice before his liberty or his property was interfered with. That being so, I think this question should be answered in the negative.

COOPER and CHUBB, JJ., concurred.

REAL, J.: I regret to say that in this case I cannot agree with the other members of the Court. The first thing I think we have to do is to look at the sections and to compare them with the provisions of the general law. In doing that we have to consider sections 9 and 10 of *The Masters and Servants Act*. A servant if he is delayed or hindered in the recovery of his wages may sue the mortgagee, and is entitled to recover wages for work done on the mortgaged property by distraining upon it. If a man is sued, and judgment obtained against him, another man cannot be sued for the same cause. Special provision has been made in the Act to protect the servant, because it provides that if he fails to obtain payment of his wages, or any part thereof, from the mortgagor, he has the right to proceed against the mortgagee for the amount. The servant has the right to sue the mortgagee notwithstanding that he might have previously sued the mortgagor and obtained judgment against him. It seems to me that the section relating to this is perfectly clear and manifest, and I feel compelled to come to the conclusion I have done upon the construction of the Statute. Had it not been for that fact I would have liked to come to the conclusion that the Court has come to, because the decision of the Court is unquestionably more convenient. It will enable a servant to have the question decided by the magistrates in a summary manner. I think, however, that the proper answer to the question is in the affirmative, and that the servant having done work within six months on the mortgaged property, he is entitled to distrain upon it. If the servant is wrong, the mortgagee is entitled to bring an action for trespass against him just the same as if he (the servant) had seized any property not covered by the warrant.

LILLEY, C.J.: Judgment in the action will be for the plaintiff Company with costs, and an injunction restraining the defendant from enforcing execution.

Solicitors for plaintiff: *Ruthning & Byram*.

Solicitors for defendant: *Chambers, Bruce & McNab*, Agents for *F. I. Power*.

MAY CIVIL SITTINGS.

LILLEY, C.J.:

28th, 30th, 31st May, 1892.
1st and 3rd June, 1892.

CRANLEY v. FAHY AND OTHERS.

Will—Revocation of Probate—Acknowledgment of signature—Succession Act (31 Vic., No. 24), s. 39—Costs.

Probate of the will of James Cranley had been granted to Margaret Fahy as sole executrix. The will bore the signature of the testator and two witnesses, Gleeson and Simpson. Gleeson made an affidavit in support of probate, stating that Cranley signed the will in the presence of the two witnesses, who signed in the presence of the testator and of each other. The jury found that the testator did not write his name, but that he acknowledged his signature in the presence of the two witnesses present at the same time, and that the signatures of Cranley and Gleeson were made in the absence of Simpson, and before Simpson came into the room.

Held, that the acknowledgment was insufficient, and that probate of the will must be revoked. The acknowledgment of his signature by a testator must be made in the presence of the two witnesses before either witness subscribes his name.

Costs of all parties as between solicitor and client were allowed out of the estate.

Re Maddock, L.R. 3 P. & D. 169, and *Casement v. Fulton*, 5 Moo., P.C., followed.

ACTION for revocation of probate of the will of James Cranley, of Cranley, near Toowoomba, on the grounds:—(1) undue execution; (2) want of sound mind; (3) undue influence; (4) want of knowledge of the contents of the will. The testator was over eighty years of age. The defendant Margaret Fahy was a daughter of the testator, and lived near Cranley. The plaintiff was a son of the testator, living at Mooraree, and used to visit his father every year, and saw him a few weeks before his death. The other children had left their father years before, and never came to see him. On March 18th, 1890, a will was prepared by Gleeson, a neighbour of Cranley. The signature of the testator was witnessed by Gleeson and James Simpson. John Fahy, husband of the defendant Margaret Fahy, a daughter of the testator and sole executrix of the will, was present. The testator left all his property to Mrs. Fahy, and directed that his wife should live with her,

and to his six sons and one other daughter he left a shilling each "for their folly and disobedience." On an application for probate of the will Gleeson made an affidavit that Cranley signed the will in the presence of himself and Simpson, and that they both subscribed the will in the presence of Cranley and of each other. Cranley died on the 3rd July, 1890. Gleeson retained possession of the will from the day of its execution till after the testator's death. Probate was granted. The plaintiff, who called evidence to prove that he was on the best terms with his father up to the time of his death, sought to upset probate of the will. Expert evidence was produced to prove that the signature James Cranley was not in the testator's handwriting. The onus being on the defendant Margaret Fahy to propound the will the defendants began.

The Attorney-General (Sir S. W. Griffith. Q.C.), and *Woolcock*, for the defendant Margaret Fahy, and her husband. *Rutledge* and *Scott*, for the plaintiff. The other defendants, the next-of-kin, did not appear.

The jury found (1) that the testator James Cranley made and acknowledged the will in the presence of Gleeson and Simpson, they being present at the same time; (2) that they in the testator's presence, and at his request, signed and attested the making of the will; (3) that the witnesses signed their names as witnesses at the testator's request, and in his presence, both witnesses not being present at the same time when so requested, and when they signed their names as witnesses, and that the signatures of the testator and Gleeson were put to the will before Simpson came in, and in his absence; (4) that the testator was of sound mind, memory, and understanding; (5) that the will was not obtained by the undue influence of the defendant or others; (6) that the testator knew and approved of the contents of the will; (7) that Cranley did not write the name 'James Cranley'; (8) that Cranley acknowledged the signature "James Cranley."

Rutledge moved for judgment for the plaintiff on the answer to question 3. The acknowledged

ment must be made in the joint presence of the witnesses before either witness signs. [LILLEY, C.J.: It has long been a moot point, and has been differently decided by the Privy Council. My impression the other day was that the witnesses need not be present at the same time, but I did not know that the acknowledgment must be before they signed.] There are several cases on all fours with the present one: *In the Goods of Simmonds*, 2 Curtis, p. 79; *Moore v. King*, 3 Curtis, p. 243; *Hindmarsh v. Charlton*, 8 H.L.C., p. 160; *re Maddock*, L.R. 3 P. & D., p. 169; *Casement v. Fulton*, 5 Mo.P.C., p. 130; *In the Goods of Lacey*, 6 W. W. and A'B., I.P. & M., p. 44; *In the Goods of Braithwaite*, 4 Vic. L.R.I.P. and M., p. 37; *Hannan v. Whitworth*, 5 N.S.W.R., P., p. 11; *Theobald on Wills*, 3rd edition, p. 24; and *Williams on Executors*, 8th edition, pp. 91 and 92. [LILLEY, C.J.: What I thought at the trial was that if the testator in the presence of two witnesses present at the same time signed or acknowledged the will, one might attest it by his name, and the other might put his signature afterwards.] The signature of the testator must be written or acknowledged in the presence of both witnesses before either of them attested or subscribed to the will. [LILLEY, C.J.: The jury found here that the testator, in the presence of both witnesses, acknowledged his will. First he made his will, and then he signed it. Then when the two witnesses were there together he acknowledged it. After that the second witness put his name. I thought that was a good execution of the will.] The case of *Moore v. King* is exactly in point, and the facts are somewhat similar. *Hindmarsh v. Charlton* is another case. [LILLEY, C.J.: I think the authorities are not worth much on that point, but if the Courts have departed from the true interpretation of the Act, I am bound to follow them, though in my judgment they are in error. I am bound by authority, but I think the construction of the section is as clear as possible. It means that two witnesses should be present at the same time, and then drops the expression.] The Courts seem to have gone from that in order

to meet the case of where two witnesses signed at different times, and the first witness had to sign over again after the acknowledgment. [LILLEY, C.J.: I don't think so, if the testator has previously acknowledged the will. The reason for the distinction seems to be absolute nonsense; it is no reason at all. It seems to me a stupid interpretation of the law, with all respect to the gentlemen who made it. Here a man makes his will. The man who actually drew it up happens to write his name as witness first. The testator clearly acknowledges it as his will. Then another man is called in, and the testator clearly acknowledges it, and that second witness puts his name. The Act says that when the will is made and signed the witnesses are to be present at the same time, and then goes on to say in a definite part of the section that the witnesses shall subscribe, but leaves out the words "being present at the same time." That being so, to put the construction that the Courts have done, seems to be a departure without any necessity or advantage from the plain language of the law. However, I am bound by authority, and shall give you judgment if you are entitled to it.] Possibly the idea of the Courts was that an acknowledgment was more likely to be *bond fide* if made in the presence of two witnesses than in that of one. [LILLEY, C.J.: I could understand that if the words as to signing at the same time ran through the whole of the section, but they do not. In one part of the section it says they must be present at the same time for every bit of the transaction, but the Courts have decided otherwise. As long as both witnesses are there, and one does not sign before the acknowledgment is made, the other may sign it at any time. It is a most extraordinary construction.] In the case of *the Goods of Allen*, 2 Curtis, 331, the principle, according to Sir H. Jenner, seems to be founded on the fact that the word "shall" is future, and that the witnesses must then attest the signature, not one at one time and one at another. [LILLEY, C.J.: I could understand that argument if the witnesses were to be present at the same time through the whole transaction, but

the Courts have decided otherwise. I do not think it is a natural construction of the section. I must not say anything about the dignitaries who have given this decision, but it seems to me they have run astray in their construction.]

The Attorney-General: It is very hard to distinguish the cases which have been cited from the present. The principle, so far as I can see, appears to be set out in the case of *Casement v. Fulton*, and seems to lay down that two witnesses must, by their signatures, attest the same act of the testator, so that, if one of the signatures was placed there before the act was attested, that signature did not count. In the last case, *re Maddock*, the question was carefully considered by Sir James Hannen, and his decision seems to be exactly the same as that in this case. [LILLEY, C.J.: I am bound by authority. If it had been a matter for me to determine for the first time I would have decided it otherwise.] So the testator's wishes will not be carried out. The defendant as executrix should have her costs out of the estate. She was bound to propound the will. *Boughton v. Knight*, 3 P. & D., 65. The plaintiff should have his costs only on the issues on which he has succeeded. There was no proof of undue influence.

Rutledge: The plaintiff has succeeded, and is entitled to his costs out of the estate. The whole circumstances were surrounded with suspicion. *Orton v. Smith*, 3 P. & D., 23. The jury found that Cranley did not sign the will himself. The costs should be as between solicitor and client. *Hannan v. Whitworth*, 5 N.S.W.R., p. 11.

LILLEY, C.J.: I am sorry the wishes of the testator will not be carried out. The will must go. I must follow the cases, but I do so with reluctance, because I do not agree with the construction of the Statute. The judgment will be to declare the plaintiff a son and one of the next-of-kin of James Cranley, deceased, to revoke probate of the will, and to declare the will of James Cranley invalid. Costs of all parties as between solicitor and client allowed out of the estate.

Solicitors for plaintiff: *Lilley & O'Sullivan*.

Solicitor for defendants: *O. W. Hamilton*.

CIVIL COURT.

September 17th, 1891.

November 2nd, 1891.

June 2nd, 1892.

LILLEY, C.J.:

TURNER AND OTHERS v. KENT AND OTHERS.

Will—Construction—Power to trustees to invest residue or continue it in existing investments—Power to trustees to carry on testator's business—Partnership subsisting between testator and another person continued by trustees—Sanction of Court to conversion of partnership into joint stock company with limited liability.

A testator by his will directed his trustees to invest the residue of his trust estate, or to continue it in existing investments, and also empowered them to carry on, or join in carrying on, any business or pursuit in which he might be engaged, either by himself or in partnership with any other person, for such time, and upon such terms as his trustees might consider expedient, but with power to the trustees, at any time prior to the final distribution of the estate, to sell and dispose of it, or any part of it; and he further directed the trustees to invest the proceeds of any such sale upon Government or real securities.

The testator died on the 6th February, 1874, without having revoked or altered his will, and probate thereof was duly granted to his executors.

At the date of his death the testator carried on the business of grazing and sheep-farming in co-partnership with W.

The trustees of the will, in pursuance of the said power, continued the partnership with W., and on the 13th August, 1874, entered into articles of partnership with the said W. for a term, which expired on the 1st May, 1879.

From the 1st May, 1879, the trustees and W. continued to carry on the business, and on the 30th April, 1887, executed a further deed continuing the partnership for a further term expiring on the 1st May, 1892.

Two of the beneficiaries under the will were infants.

In an administration suit instituted by the executors and trustees against the infant beneficiaries and one of the other beneficiaries, the Court made the usual administration decree with the addition of a direction for special inquiries, and upon further consideration sanctioned the conversion of the partnership into a joint stock company with limited liability, and directed the insertion of special clauses in the memorandum and articles of association for the protection of the infant beneficiaries.

Service of decree upon all persons other than parties to the suit dispensed with.

THIS was a suit for administration of the trusts of the will of William Kent (otherwise known as William Kent, Junior), formerly of Jondaryan, Darling Downs, grazier, deceased, instituted by John Sargent Turner, William Charles Williams, and Martha Kent, executors, executrix, and trustees of the said will, against Martha Wilhelmina Kent, and Edward Graham Kent, infants, by their guardians James Henry McConnell and Walton Kent, under the following circumstances: The testator duly made his last will, dated the 26th February, 1873, whereby he gave, devised, and bequeathed all his property, real and personal, to the plaintiffs John Sargent Turner and William Graham, then their executors, administrators, and assigns, in trust, after payment of his just debts, funeral, and testamentary expenses, and certain pecuniary legacies, to invest the same, or continue the same on existing investments; and to collect and receive the rents, issues, profits, and annual produce thereof, and pay the same to his wife the plaintiff Martha Kent, so long as she should remain his widow and unmarried, for her support and maintenance, and the support, maintenance, and education of his children, who should be living at the time of his death, or born in due time thereafter, whether above the age of twenty-one years or not; and in case his said wife should marry again after his decease, he directed the said plaintiffs immediately thereupon to stand possessed of the said trust estate, upon trust to pay and apply the rents, interest, profits, and annual produce thereof, or so much thereof as they might think fit, unto and for the use and benefit of his said children born, or to be born, indiscriminately, in such manner as the said plaintiffs should consider most beneficial, and invest any accumulation therefrom, which should thereupon become and form part of the said estate. And from and after the decease or second marriage of his said wife, he directed that his said trust estate should be divided unto and equally between his nephew William Charles Williams (one of the plaintiffs) and his children, when and as they should successively attain the respective ages of twenty-one

years, the income of the apparent or presumptive share of each of such children, or so much thereof as the said plaintiffs should think fit, being in the meantime applied towards his or her maintenance and education, and the shares of any or either of them dying before the said age without leaving issue to be equally divided amongst the survivors, or to go to the survivor, if only one, of such children. And he directed that the child or children collectively of the said William Charles Williams, or of any deceased child of his, should take the share or shares which their parents would have taken if living. And he authorised the said plaintiffs to pay and apply for the benefit and advancement of the said William Charles Williams, or of any such children, whether a minor or of full age, not more than a quarter of any share to which he or she or they might be actually or presumptively entitled under his said will, but during the lifetime of his said wife, she having remained his widow and unmarried, not without her sanction and consent in writing.

The testator also thereby declared that the plaintiffs should have full power to carry on, or join in carrying on, any business or pursuit in which he might be engaged, either by himself or in partnership with any other person, for such time and on such terms as the said plaintiffs might consider expedient, without being in any way answerable for loss therefrom; but with power to the said plaintiffs, at any time prior to the final distribution of his said trust estate that the said plaintiffs might consider desirable or advantageous to such final distribution, to sell and dispose thereof, or any part or parts thereof. And he directed the plaintiffs to invest the proceeds of any such sale or sales upon Government or real securities in any of the Australian colonies, and stand possessed thereof upon and for the like trusts, interests, and purposes as were thereinbefore directed and declared concerning the same.

The testator also appointed the said plaintiffs, John Sargent Turner, William Graham, and Martha Kent, executors and executrix of his said will. By a codicil to his said will, dated the 30th

August, 1873, the testator appointed the plaintiff, William Charles Williams, to be an executor and trustee thereof, together with, and in addition to, the other plaintiffs.

The testator died on the 6th February, 1874, without having revoked or altered his said will and codicil, and on the 11th June, 1874, probate thereof was granted to the plaintiffs as executors and executrix thereof.

The testator left him surviving the plaintiff, Martha Kent, his widow, and thirteen children, all of whom were of the age of twenty-one years, except the defendants Martha Wilhelmina Kent and Edward Graham Kent, who were infants under that age.

The defendant Walton Kent was a son of the testator.

The plaintiff Martha Kent had not re-married.

The testator at the time of his death was carrying on business as a grazier and sheep farmer in co-partnership with one Edward Wienholt, at Jondaryan and Noondal Stations, in the Darling Downs district, and at Tarampa and Mount Flinders, in the district of Moreton, and at Dalingall, in the district of Burnett, in this colony; and he was entitled to an equal half-part or share with the said Edward Wienholt in the said station properties, and in the profits and annual produce thereof. The testator was also entitled to other real and personal estate.

By an indenture of partnership dated the 13th August, 1874, made between the plaintiffs John Sargent Turner, William Graham, and William Charles Williams, as such trustees of the first part, the said Edward Wienholt of the second part, and the plaintiff Martha Kent of the third part, it was witnessed that the said plaintiffs John Sargent Turner, William Graham, and William Charles Williams, and the said Edward Wienholt, should continue the said business as carried on as aforesaid, for the period of five years from the 1st May, 1874.

After the expiration of the said term of five years the said partnership continued to be carried on under the terms and conditions of the said indenture.

By an indenture dated the 30th April, 1887, and made between the plaintiffs John Sargent Turner, William Graham, and William Charles Williams, of the first part, the said Edward Wienholt of the second part, and the said Martha Kent of the third part, the said parties thereby covenanted to remain and continue partners together in the said business for a further term of five years from the 1st May, 1887, upon the terms and conditions in the said indenture of partnership contained.

Edward Wienholt refused to carry on the said partnership after the expiration of the last mentioned term.

The value of the partnership property was very great, and the debts of the partnership secured upon the partnership property were considerable.

The suit came on for hearing on the 16th September, 1891, as against the infant defendants, and on motion for judgment upon admissions in the pleadings, as against the defendant Walton Kent.

Sir S. W. Griffith, Q.C., A.G., and Lilley, for the plaintiffs. The Court is asked to sanction a scheme for the conversion of the partnership into a joint stock company with limited liability. There is clearly power to the trustees to continue the existing partnership. They might also properly admit new partners. That being so, it is only another step to the conversion of the partnership into a company, and thence to its conversion into a company with limited liability.

Scott, for the defendant Walton Kent, consented to the usual administration decree and to the scheme for conversion of the partnership into a company with limited liability, and, on behalf of the infant defendants, submitted to such decree or order as the Court might think fit to make.

LILLEY, C.J., made the usual decree for the administration of the estate of the testator, and directed the following special enquiry, viz.:—an enquiry whether the proposed scheme for the conversion of the partnership into a company with limited liability would be practicable, or whether any other or similar scheme could be carried out,

and whether it would be for the benefit of the infant defendants, and, if so, on what terms; and dispensed with service of the decree on all the beneficiaries except service upon the solicitors of the defendants.

On the 28th September, 1891, a summons for leave to proceed was heard before Lilley, C.J., who made the usual order, giving the plaintiffs leave to proceed, fixing the date of the enquiry before the Registrar, and limiting such enquiry to the special enquiry above-mentioned.

On the 2nd November, 1891, the further consideration upon the Registrar's certificate of result of enquiry was adjourned to a day to be fixed.

The matter came on for further consideration on 2nd June, 1892.

LILLEY, C.J., then sanctioned the conversion of the partnership into a joint stock company with limited liability, to be incorporated and registered in this colony, and directed the insertion in the memorandum and articles of association of the proposed company submitted to the Court, of the following clauses:—First, in the memorandum of association, a provision that, so long as the shares numbered 1 to 10,000, and 40,001 to 59,998, both inclusive, should be held collectively by the said John Sargent Turner, William Graham, and William Charles Williams, trustees of the will of William Kent, Junior, no sale of any of the assets of the company, otherwise than in the ordinary course of management, should be made, except with the concurrence of the holders of such shares. Secondly, in the articles, a provision that, so long as the said shares should be held collectively by the said John Sargent Turner, William Graham, and William Charles Williams, or their assigns, or transferees, the holders of such shares for the time being, not exceeding three, should be directors of the company, and should be entitled collectively to as many votes as directors as all the other directors of the company, but should not be entitled to vote in respect of such shares at any election of directors. Costs of plaintiffs and defendants to be taxed as between solicitor and client, and to be paid out of the estate.

Solicitors for the plaintiffs: *Ruthning & Byram*.
Solicitors for the defendants: *Hart & Flower*.

LILLEY, C.J.:

June 6th, 1892.

In the matter of EMILY ANN AND LILLIAN MCCROHON, AND in re THE WILL OF JOHN MCCROHON, DECEASED.

The Guardianship and Custody of Infants Act of 1891, ss. 7, 13—Removal of guardian—Religious education.

J. McCrohon, a Roman Catholic, married a Protestant and had issue, two daughters. The mother died two months before the father. The mother was allowed to give her children, who were aged four and six years respectively, religious instruction in accordance with the rites of the Church of England. Before his death, and after making his will, the father instructed one of the guardians never to allow a Roman Catholic to have charge of his children. McCrohon by his will appointed Land and Brown guardians of his children. A document, dated after the will, directed the children to be given to the testator's mother to be brought up in the Roman Catholic religion. On an application to change the guardians, and have the children brought up as Roman Catholics, *Held*, that children must be brought up in the religion of the father, unless he has expressed a wish that they should be otherwise instructed, or unless he has abandoned his parental right under circumstances which would make a reassertion of it cruel and unjust to the children, and against their interests.

Held, also, that if the document mentioned was signed by McCrohon with a sufficient understanding of its contents, and as his last wish, the children must be brought up as Roman Catholics. Further evidence of the circumstances of the change of intention on the part of the father, and of the execution of that document, were required before the final order could be made.

MOTION for removal of William Land and F. G. Brown, the testamentary guardians of Emily Ann and Lillian McCrohon, appointed under the will of John McCrohon, by Ann McCrohon, the grandmother of the said infants, as next friend; or, in the event of their non-removal, that the said Ann McCrohon and the Reverend J. D. Nolan might be associated in the guardianship of the infants, and for a direction that the said infants ought to be instructed in the Roman Catholic religion.

Rutledge, and G. W. Power, for the infants, by their next friend; *Lilley*, for the guardians.

The evidence tendered was by affidavit, and the case appeared from the judgment.

Rutledge: The religious and secular education of the infants is being completely neglected. The father was a Roman Catholic. *Hawksworth v. Hawksworth*, L.R., 6 Ch., 539; and *In re Cathward Read*, 5 Times L.R., 615, were cited.

Lilley: The infants are being well treated. The father, although a Roman Catholic, desired the children should be brought up as Protestants. *Hill v. Hill*, 31 L.J., (Ch.) 535; *In re Garnett*, 20 W.R., 222; *In re Clarke*, 21 Ch.D., 817; *re O'Malley*, 8 Ir. R. Ch., 291; *re Kellaie*, 5 Ir. R. Ch., 328; *re Nevin* (1891), 2 Ch., 299, were cited.

LILLEY, C.J.: In any case I shall not send the children to an eleemosynary institution such as an orphanage. Such institutions are good. This is not an extreme case. The children might not be so well treated, and would be a charge on the State.

Rutledge referred to *Andrews v. Salt*, L.R. 8, Ch. 622.

Power followed.

C.A.V.

LILLEY, C.J.: This is an application under section 7 of *The Guardianship and Custody of Infants Act of 1891*, section 18 being also relied on, for the removal of testamentary guardians, and that such guardianship be committed to Ann McCrohon and the Reverend J. D. Nolan, or, that the infants be sent to a Roman Catholic Orphanage. John McCrohon, a Roman Catholic, married in accordance with the ritual of the Roman Catholic Church, one Susan Rich, a Protestant, in or about the year 1881, and had by her the infant children Emily Ann and Lillian McCrohon, now aged nine and seven years respectively. The mother died a few months before the father, who died in the Herberston Hospital nearly two years ago—that is, in August, 1890. It is important to remember that at the death of the mother the children were respectively under four and six years old, and at

the time of the father's death they were not more than five and seven years of age. John McCrohon was, during his active healthy life, either an agnostic or indifferent to religious observances. He allowed his wife to give "such religious instruction to her infant children, according to their tender age, as she thought advisable in accordance with the rites and forms of the Church of England." She was a "good religious woman, and desirous of bringing up her children as Protestants." William Land, one of the guardians under the will of John McCrohon, during the lifetime of the parents, gave, and has since given the infant children both secular and religious instruction, and his sister for some months past has had the care and custody of the children jointly with him. John McCrohon made his will about two months previous to his death. During his lifetime, both before and after the making of his will, he gave instructions to one of the guardians (Brown) "that his (McCrohon's) own family were never to get the infant children, stating for his reason that he knew they would be brought up in the Roman Catholic religion, and that his family were very bigoted, and, further, that he had faithfully promised his wife that he would never allow any Roman Catholic to have charge of his children." It appears that John McCrohon's wife wished to bring up the children as Protestants. After the making of his will, and only four days before his death, he said to the guardian Brown "I depend upon you and Bill (William Land the other guardian) to take charge of the children; so long as I am alive and can help it no Roman Catholic will ever get them, and in the event of my death I depend upon you as the guardians of my children to carry out my wishes. I have had communications from my mother about the custody of the children, but I have always refused to let her have anything to do with them." McCrohon made his will on the 4th June, 1890, and appointed Land and Brown guardians of his children. It is alleged that, on the 3rd August, 1890, he signed a document in these words: "I, John McCrohon, do hereby express my sincere wish and desire to

have my two children Emily McCrohon and Lillian McCrohon given to my mother Ann McCrohon to be brought up by her in the Roman Catholic religion. John McCrohon X his mark." Of the two witnesses to this document one is said to be dead and the other cannot be found. The Rev. J. D. Nolan speaks to it only from hearsay. A wardsman swears, however, he was present and saw it signed, and that McCrohon was of sound mind and memory and understanding, and expressed his approval of the document. McCrohon was not a marksman, and within a few hours before his death seemed to be an agnostic. He was a freemason, which is, perhaps, inconsistent with his holding bigoted Roman Catholic opinions. In the absence of this instrument of August, 1890, it would have been clear that the wish of both parents was that the children should be brought up in the Protestant faith, and not as Roman Catholics. This Court is by law absolutely neutral on distinctive doctrines of religion as between the various sects. We do not decide whether one form of faith is better than another, or the best of all. But the law is clear; children must be brought up in the religion of the father, unless he has expressed a wish that they should be otherwise instructed, or unless he has abandoned his parental right under circumstances which would make a reassertion of it cruel and unjust to the children, and against their interests. This is a sufficient statement of the rule and exception for the purposes of this case. The applicant alleges that John McCrohon "died fortified by the rites of the Roman Catholic religion," that his last expressed wish was that his children should be brought up as Roman Catholics, that the testamentary guardians are not of that religion, that they were bachelors, and that the children's education, both religious and secular, is being completely neglected. The evidence satisfies me that this last statement is not according to fact. It is clearly erroneous. In relation to religion, the children, one would hope, have had no instruction as to the controversial differences between Catholics and Protestants. The simple prayers

and hopes of Christian children all the world over have doubtless been all they have learnt. The evidence shows that the mother, the guardians, and Miss Land have instructed them in secular subjects and simple piety, and Land and his sister, being relations of the children's father (the late Mr. McCrohon), have provided for them at their own cost, the father's estate being insolvent. If the document of August was signed by John McCrohon with a sufficient understanding of its contents, and as his last wish, then these infants must be brought up in the Roman Catholic religion. It would be more satisfactory to me to have further evidence of what took place when it is said the instrument was signed, by whom, when, how, and under what circumstances he was induced or volunteered to sign it. How did such a sudden change of intention come about? If the seal of confession locks up any secret I do not ask that it be broken. Against the document, when once established, I see nothing in this case that can prevail. The promise to the mother is of no effect against it. The father survived her, and his rights as parent would always prevail over any previous promise or contract. Had she survived, he would, possibly, being an amiable man, have respected her wish. I do not see any evidence of any binding abandonment or waiver of his right to direct the course of the religious instruction of his children. There is much in the case, however, and on the face of the document of August, to justify me in requiring some further and more satisfactory evidence of the change of mind on the part of John McCrohon. When once satisfied of that, I will order that the children be brought up in the Roman Catholic religion according to his wish—with such other orders, directions, and enquiries as may be necessary. The father's estate is insolvent, I have no fund in Court, and the children are not wards of Court. The applicant may possibly be required to deposit say £100, and the children may be made wards of Court. All these matters, however, I defer for further consideration upon the additional evidence I desire to have before referring the matter to Chambers,

if necessary, to settle a plan for the children's education. There will be further hearing, further consideration, and leave to apply.

Solicitor for infants: *A. J. Thynne.*

Solicitors for guardians: *Lilley & O'Sullivan.*

SOUTHERN DISTRICT COURT.

PAUL, J.:

8th July, 1892.

POCOCK v. FALKINER.

Interpleader—Married Women's Property Act, 1890, (54 Vic., No. 9), ss 4, 7—Interest of woman married before the Act.

A woman married before the passing of *The Married Women's Property Act*, purchased certain goods with money left her by her father's will before that Act. The money was not settled upon her for her separate use. On an interpleader summons the issue raised was whether the goods purchased with such money were her separate property or her husband's.

Held, that if a woman married before the commencement of the Act acquire a title to property which is not settled upon her for her separate use, such property is not her separate estate unless it falls into her possession after the commencement of the Act.

Reid v. Reid, 31 Ch.D., 402, followed.

INTERPLEADER.

Dickson for claimant.

Lukin for execution creditor.

The facts appear from the judgment.

C.A.V.

PAUL, J.: The facts shortly were these. The plaintiff Pocock recovered judgment against Robert Falkiner in the April sittings of the District Court. In pursuance of that judgment the bailiff levied on the goods in the house in which the defendant and his wife lived. The wife then makes a claim on those goods, being household furniture, piano, and other things; makes a list of them, and sets out the grounds of her claim. The general ground of the claim is that the property belonged to her, and not to her husband. That is the point which I have to decide. The claimants' case is that she purchased the property which she had claimed with money which she

received both before and after the 1st January, 1891, under her father's will. That is to say: it was with money left to her, together with her sisters, under the will of her father, who died eight years ago. Now Mrs. Falkiner was married many years before that; but, so far as this action is concerned, it is sufficient that she was married before the 1st of January, 1891, the date on which *The Married Woman's Property Act* in Queensland came into force. The issue of the interpleader, therefore, is whether the property in question belongs to Robert Falkiner or to his wife. I find as a fact that the goods levied on, and which Mrs. Falkiner claims, were, with the exception of a few articles which were given to her before the 1st of January, purchased with money received under the will by her, and not with money belonging to the husband. Neither the will nor the probate were produced at the hearing; so I must presume that the property which was left to her and her trustees, and the proceeds of which she received from time to time, both before January, 1891, and after January, 1891, was not settled upon her for her separate use. If that had been shown to me, it would have altered the whole judgment which I am about to give. Therefore, I presume that was not the case, or it would have been a complete answer to the objection raised, or the property would have been her property if it had been settled upon her for her separate use under the will. But I presume it was not. The question of law which I have to decide, therefore, is whether the money received by her is her separate estate; that is to say, as far as the present question is concerned, whether the property which was purchased with that money is her separate estate. Now *The Married Woman's Property Act* came into force in Queensland on the 1st day of January, 1891, *vide* section 1. Section 4 of that Act reads as follows:—"Every woman who marries after the commencement of this Act shall be entitled to have, and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or

shall be acquired by, or devolve upon her, after marriage." That is the substance of the section—that the property of a married woman, married after the Act came into force, is held by her as if she were not married. But it does not apply in the present case; and I have referred to it for the purpose of afterwards making reference to the word "devolve." This word is different to that which is used in section 7, under which section I have to decide this case. Section 7 of the Queensland Act says:—"Every woman married before the commencement of this Act shall be entitled to have, and to hold, and to dispose of, in manner aforesaid, as her separate property, all real and personal property, her title to which,"—those are the words upon which other questions will be decided—"whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue"—that is another word material to this Act—"after the commencement of this Act, including any wages, money, and property so gained or acquired by her as aforesaid." Now, according to that section, a married woman who acquires property after that Act came into force would have it as her separate property, if her title to it did not come into force before the 1st of January, 1891. Now, that section refers to women married before the Act came into force. Mrs. Falkiner was married before the commencement of the Act. The question therefore arises: Did her title to the property, the result of the money which she had been left, accrue before the commencement of the Act? It is upon those words that I have to give judgment against Mrs. Falkiner. I had a doubt at the hearing as to whether the word "accrue" was equivalent to "possession." I think the goods or money she received after the 1st of January, 1891, would have become her separate estate if the word "accrue" had the same meaning as "coming into possession," or—as in section 4—"devolve." If the word "devolve" instead of "accrue" had been used, all the money received by her after the 1st of January, 1891, would have been her separate estate. If she had been married after the passing of this Act, all the

money received would have been hers. The principle of the Act, therefore, is: that in the case of a married woman receiving property before this Act came into force, it would become the property of her husband. This Act makes no difference in that respect. Now as to the word "accrue," I refer to the case of *Reid v. Reid*, 31 Ch.D., 402. That clearly decides this point. The case was not quoted to me at the hearing, otherwise there would have been no necessity for me to postpone judgment, the matter is decided so clearly. The question there turned on the meaning of the word "accrue," and the gist of the decision is this:—that where a woman married before the commencement of *The Married Women's Property Act of 1882*—that is the English Act—(and section 7 of that Act is similar to section 5 of our Act) has, before the commencement of the Act, acquired a title, whether vested or contingent, or whether in possession, reversion, or remainder, such property is not made her separate estate unless it falls into her possession after the commencement of the Act. In the present case, therefore, I find that Mrs. Falkiner acquired her title before the Act came into force, when her father died eight years ago; therefore she acquired the title, whether vested or contingent, before the passing of the Act; that does not make it her separate estate. As a question of law I find that the property does not belong to Mrs. Falkiner, and, although it is not necessary for me to do so, I further find that the property belongs to the husband. My desire would be to protect the property, if it had been acquired in a *bonâ fide* manner by the wife's money, from the debts of her husband; but, of course, however hard the law may appear in that respect, I have only to administer it. I may state that even had there been no Married Women's Property Act Mrs. Falkiner would have been in the same position as she is at the present time. The fact that the money was received after the Act came into force no doubt caused the impression that it belonged to the wife. If the words in the Act had been "devolve upon" the wife after the 1st of January, 1891, instead of

"accrue to" her, my judgment would have been different. I find, then, formally, that the property seized was not the property of the claimant Mrs. Falkiner. On the facts I am satisfied that Mrs. Falkiner's claim was *bonâ fide*; and I also find that what she said was correct—that the property which she claimed was purchased with money which she received under her father's will.

Judgment was accordingly entered for the execution creditor.

Solicitors for execution creditor: *Unmack & Fox*.

Solicitor for claimant: *F. G. Hamilton*.

IN CHAMBERS.

REAL, J.: 25th July, 1892.

WIDGEE DIVISIONAL BOARD *v.* MCGHIE, LUYA
AND CO.

*Rating—Appeal—Fresh valuation—54 Vic., No.
24, s. 14.*

McGhie, Luya & Co. being rated by the Widgee Divisional Board appealed against the valuation, and objected to the jurisdiction of the Court as no fresh valuation, within the meaning of *The Valuation and Rating Act of 1890*, had been made. The Board had adopted the valuation of the previous year, and the valuation conformed with Schedule ii. of the said Act. The justices upheld the objection, and refused to hear the appeal.

Held, on appeal, that the justices had jurisdiction to hear the appeal, and that it was competent for the Board to adopt the previous valuation.

SPECIAL case.

In this case McGhie, Luya & Co. appealed against the valuation of the Widgee Divisional Board. At the hearing it was objected by the appellants that the justices had no jurisdiction to hear the appeal, as there was no fresh valuation within the meaning of *The Valuation and Rating Act of 1890*. The Board had adopted the valuation of the year before. It was admitted that all the proper notices had been given. The Board appealed from the justices' decision.

Power, for the Board: It was quite competent for the Board to adopt the valuation of the pre-

vious year within the meaning of s. 14 of *The Valuation and Rating Act of 1890*. There was a fresh act on the part of the Board, although the valuation was the same. It is discretionary on the part of the Board to employ a valuator—s. 15. The valuation conforms with Schedule ii. of *The Act of 1890*. The justices had jurisdiction to hear the appeal.

Byrnes, S.G., for the appellants below, *contra*. The Act requires a fresh valuation on an entirely new system.

REAL, J., was of opinion that the Board could adopt a previous valuation, and that the justices had jurisdiction to hear the appeal, but allowed no costs.

Solicitors for the Board: *Chambers, Bruce & McNab*, agents for *F. I. Power*, Gympie.

Solicitors for appellants: *Bernays & Osborne*, agents for *Tozer & Conwell*.

AUGUST SITTINGS OF THE FULL COURT.

Re R. G. WYNN WILLIAMS, SOLICITOR.

Solicitor—New Zealand rules—Reciprocity.

A solicitor of New Zealand admitted there under the rules requiring service under articles, and who has passed an examination in general knowledge, is entitled to admission here under the reciprocity rule, after passing an examination in general law and the statute law of Queensland, so far as it differs from that of England.

Quære—The right of admission of a person admitted under the new rules which do not require service under articles.

MOTION for an order directing the Board of Examiners for Solicitors to examine R. G. Wynn Williams, a solicitor of New Zealand, in accordance with the rule of reciprocity referred to the Full Court by Real, J.

Sir S. W. Griffith, Q.C., A. G., and *Lilley*, for the applicant.

Mr. Williams was admitted as a solicitor in New Zealand on the 17th September, 1884. He was admitted under the old rules, which required service under articles for five years, and which

were practically the same as the Queensland rules. Since then a new set of rules obtained in New Zealand, and no articles are now necessary.

REAL, J.: The matter was before me in Chambers. I was doubtful on the decision of this Court that it would go behind the admission and see what the service was, whether the mere fact of admission was sufficient. I was also influenced by the fact that an Act had passed the Lower House in New Zealand abolishing the literary examination for barristers.

The Attorney-General: It has not become law. Mr. Williams was admitted under the old rules. [LILLEY, C.J.: And probably passed all the examinations. I do not know whether we could receive one of these gentlemen who come from an auctioneer's room, for instance, with a knowledge of a little English and a little law. Mr. Williams stands in a different position. He had certain rights under the rules existing before the passing of this new legislation, and it would be hard to deprive him of rights entitling him to reciprocity. HARDING, J.: We only go behind a certificate and do not admit a man when he comes with an inferior qualification to the general run of men, or has got into the profession by a side wind, and has not complied with the examination of *bona fide* solicitors.] A new point has arisen now in New Zealand; no service is required in New Zealand now, but it was when Mr. Williams was admitted. [HARDING, J.: We can decide that when the point arises. REAL, J.: Can we give reciprocity, where we know, as the law stands, we will not admit New Zealand people though we may admit persons admitted under some previous law? LILLEY, C.J.: If there has been no alteration we stand in the same position as before.] Since the *Rules of 1879* were passed, a great alteration has been made. It is within the spirit of the rule that he should be examined.

LILLEY, C.J.: Reciprocity with New Zealand must be a doubtful matter now, but it would be imposing something like a penalty on Mr. Williams if we made him suffer for the lower qualification of other persons. This benefit will be given to

those who applied for admission before the new legislation in New Zealand was passed, but those who come afterwards will have to pass an examination in general knowledge. Let Mr. Williams be examined in two papers; one in general law, and the other in the law of Queensland, in so far as it differs from the law of England.

EWAN v. THE QUEENSLAND INVESTMENT COMPANY
LIMITED.

Practice—New trial—Rejection of evidence tendered after close of case—Discretion of judge.

The plaintiff mortgaged a station, with cattle, to the defendants, who took possession on 15th May, 1886. A dispute arose between the parties, when the defendant took over the station and cattle, as to the ownership of one hundred head of cattle, the plaintiff's contention being that the defendants took the cattle from another station and placed them on the mortgaged station. There were other claims, £40 10s. for rent, £90 for the use of horses after possession had been taken, and damages for alleged conversion of cattle. The drover who drove the cattle in dispute was not found till the last day of the trial. The defendants asked leave to examine him after counsel had addressed the jury, but Cooper, J., refused the request.

Held, that as the conduct of the trial was in the discretion of the judge, and as there was not a strong probability that the result would have been different if the evidence had been admitted, the Full Court would not say the findings of the jury were unreasonable, but directed the finding in the plaintiff's favour of £40 10s. for rent to be reversed and deducted from the amount of the judgment, as the evidence showed there was a lack of authority to support the finding.

MOTION for a rule absolute to set aside the verdict and judgment for the several sums of £40 10s., £90, and £2,357 10s. entered for the plaintiff, and for a new trial, on the grounds: (1) That the verdict was against the evidence and the weight of evidence; (2) that there was no evidence to support the judgment for the sum of £90; (3) that the evidence of the plaintiff as to conversation he had with Andrew Bogle and Reginald Edward Finlay was improperly admitted by the learned judge; (4) that fresh evidence had been discovered since the trial of the action on behalf of the defendant company; (5) that the learned judge

misdirected the jury on the evidence given by James Roode Storey. The defendants further moved to set aside the judgment in plaintiff's favour for the sum of £195 12s. 6d., and to have judgment entered for them.

The action was tried at Townsville August, 1891. The rule *nisi* was moved for at the November sitting of the Full Court. Before that it had been moved for before the Northern Court and refused. It was granted here by way of appeal, and when it was returned at the December Court the Court sent it North again, to be argued on the motion for the rule absolute. Some further delay arose, and before the matter could be dealt with the law was altered, and it had to be brought back to Brisbane. It now came before the Court as a remanet from the last sittings. The action was brought by William Grey Ewan against the Queensland Investment and Land Mortgage Company, Limited, who were mortgagees of a cattle station called Waterview. The mortgage covered the station, all the cattle on it, and all the cattle used in connection with it. The mortgagees took possession on 15th May, 1886. Plaintiff at that time was resident on the station under these circumstances. He had been the owner of the station, and had sold it to the mortgagor, and the mortgagor being unable to pay the purchase money, there had been some arrangement between the mortgagor and himself that Ewan should take it back. There were four different causes of action. The first was for £40 10s., which plaintiff claimed as rent for land which he took up in his own name, for his own benefit, and afterwards forfeited. He then claimed £90 as a sort of rent for the use of thirty horses after the defendants had taken possession. His case was that he made arrangements to sell them to the mortgagees' agent for £12 ahead, and the mortgagees refused to ratify it. The third cause of action was the sum of £2,357 10s. for the alleged conversion of a thousand head of cattle. The plaintiff's case with regard to that was that about two months before the mortgagees took possession he was travelling in a steamer to Townsville with the mortgagor,

and agreed to buy one hundred head of cattle. After this these cattle were more or less sent by the mortgagor from another station not included in the mortgage to defendants, called Hinchinbrook. That station was under the management of the same manager as Waterview. Defendants, when they took possession on 15th May, took possession of the cattle that they found on the station, and among them were these cattle. The plaintiff alleged that the cattle were taken from another place by defendants when they took possession, and placed on Waterview. The defendants said they did nothing but take possession of the station and cattle upon it. The drover who drove the cattle in dispute could not be found when the trial commenced, but was found on the very last day of the trial. Permission was then asked by defendants to examine him, but it was refused by the judge. The other part of the case was for £195 12s. 6d. damages for non-delivery of cattle. There was an agreement to sell five hundred head of cattle to plaintiff.

Sir S. W. Griffith, Q.C., A.G.; Power and Feez, for the appellants. *Byrnes, S.G., and Mansfield*, for respondents.

Byrnes, S.G.: The refusal of the judge to allow the drover to be called at the close of the case was a matter within his discretion, and it was a discretion which the Court of Appeal would be very loath to interfere with. The plaintiffs had ample opportunity of securing the attendance of the witness, but it did not appear that they made any effort to find him. All they did was to send a subpoena to the police magistrate at Ingham for the witness, and then they discovered that he could not be found. Then, when the case had nearly ended, they asked the judge to re-open the whole case, and he refused to do so. The rule *nisi* calling upon plaintiff to show cause why the results of the trial should not be set aside was obtained on the statement that fresh evidence had been discovered since the trial of the action on behalf of the defendant company. It could not be said that the evidence of this witness was fresh evidence, because plaintiffs had known of it ever since the

trial commenced. [REAL, J.: They might have known that he was one of the drovers, but not what his evidence was.] They subpoenaed him to give evidence [LILLEY, C.J.: The difficulty with me is to shut out evidence. There is always the danger of getting false evidence, but that is a matter for the jury and the judge, but why should any light be shut out at all? In the case of perjured evidence simply got up to contradict I would do as the judge did here. He has the conduct of the case before him, and he knows better than we do.] It cannot be said that this was a discovery of fresh evidence. [LILLEY, C.J.: Not since the trial. *The Attorney-General*: Since what the judge thought was the close of the trial.] The defendants never asked for any postponement of the trial on the ground of the absence of this witness, though they did on that of others. [Power: "Whose whereabouts we knew."] They knew that these witnesses were somewhere on the Continent of Europe. With regard to this particular witness they took no steps to inquire after him until shortly before the trial. The affidavit of G. C. S. Smith, agent for Messrs. Hart & Flower at Townsville, showed that they issued a subpoena to Alex. A. Perry, the drover in question, on 11th August, forwarding the same to the police magistrate at Ingham, the last known place of residence of the man. This was about two weeks before the trial. When the man was found he was engaged as a telegraph line repairer some ten miles out of Townsville. [REAL, J.: These affidavits are drawn out to lead us to believe that they did not know he was a telegraph line repairer. I am inclined to think they must have known that, and that these affidavits have been carefully drawn to leave the Court under the impression that he was a drover whose whereabouts might be anywhere.] The man must have been within a stone's throw of Townsville the whole of the time. [HARDING, J.: Shortly, what would have been the effect of his evidence? Supposing it had been believed to the prejudice of all other evidence, what would have been the effect?] He would have deposed

cattle having been brought from Hinchin-

brook Station and not from Tocal Station to Waterview, and the jury might have given a different verdict, or they might not. The mere fact of the cattle having been driven from Hinchinbrook to Waterview, and being on the latter station, would not give them to the defendant company. That would depend upon the fact of whose property they were. The jury found specifically that they were not covered by the mortgage. On the question of the plaintiff's *bona fides* trying to get in this evidence, the cases of *Gorrie v. Goldsmith*, 4 Q.L.J., 35; *Anderson v. Titmas*, 36 L.T. (N.S.), 711; and *Broadhead v. Marshall*, 2 W.Bl., 955, were cited.

Mansfield: On the claim for damages for conversion of stock, referred to the evidence contained in correspondence and documents. The consideration for the second agreement was obtained by fraud, and the evidence fully supported the finding of the jury on that part of the case. No objection was taken to the direction of the judge. *Willmott v. Barber*, 15 Ch.D., 96; *Smith v. Hughes*, L.R., 6 Q.B., 597; *Hirschfield v. London, Brighton, and South Coast Railway Company*, 2 Q.B.D., 1; *Ferrand v. Bingley Township District Local Board*, 8 *Times Reports*, 70; *Elliott v. Gilechrist, Watt & Co.*, 3 Q.L.J., 93, were cited. On the whole the plaintiffs were entitled to the benefit of the findings of the jury and the judgment in their favour.

The Attorney-General in reply: When the matters in dispute arose Rochfort Brothers were the mortgagors of Waterview Station with 10,000 head of cattle thereon, or on any land adjoining or used in connection with Waterview. One of the questions in the case was whether Hinchinbrook fell within that description. It was sworn that that station was under the management of Waterview, and that cattle were transferred from Hinchinbrook to Waterview. The only evidence of plaintiff's title to those cattle was that he had a conversation with Mr. Rochfort on the steamer, and he agreed to purchase one thousand head of cattle from the latter. There was no proof of possession of some specific cattle. [HARDING, J.: I take it that the

jury found that.] The finding of the jury is not reasonable. [HARDING, J.: The jury had not two stories before them.] They had the whole story on both sides, but the evidence as to this conversion was most vague and shadowy, and it was unreasonable to find a verdict for plaintiff on that evidence. The whole thing was so vague and uncertain that a nonsuit was moved for at the trial. The defendant company took possession of the whole station and all that was upon it. It could not be said that there was any conversion on their part until the particular cattle had been identified. They took lawful possession, and Ewan said that amongst the things they took possession of were his cattle. [REAL, J.: That is what he does not say. He says, "You took possession of that property, and it being in negotiation for me to purchase it, your manager, thinking I would get it, went to a selection of mine and took 943 head of my cattle."]] That of course was what he swore. The only evidence of conversion was that the cattle were placed on an unfenced selection near the Waterview Station. The weight of evidence went to show that the cattle were rightly taken possession of. The defendant company is entitled to judgment.

Power, and Feez, followed.

LILLEY, C.J.: This is a rule calling on the plaintiff to show cause why there should not be a new trial in respect of various items which the jury allowed at the trial, and in respect of £195 12s. 6d., that the judgment should be entered for the defendants instead of for the plaintiff. The first ground that was pressed upon us for the granting of the new trial is, that at a late period of the trial, the judge, upon application made to him, refused to receive the evidence of a man named Perry, and it is said that if he had acted otherwise, and had allowed the evidence to be received and given to the jury, there is a probability that the result of the trial would have been in favour of the defendants and not in favour of the plaintiff. Now I, and I think judges generally, are in favour of the greatest possible liberality of admission, especially in civil cases; but the trial

and the reception of evidence—the whole conduct of the trial, is under the rule and governance of the presiding judge. He has a very large discretion in the conduct of the trial before him. The principal care of the judge would be to see that no evidence which is legally receivable when tendered by either party is rejected. In fact, everything that can possibly be received should be presented to him and to the jury. Hence we are equally liberal with amendments and every other variation in the conduct of the trial which will enable the matter to be finally judged, and the very right to be determined between the parties. But the whole matter of the case before the judge must be matter legally receivable and relevant to the issues to be tried. We go even so far as this, at all events some judges do—I myself do—even where the parties have not raised any specific issue on some matters of fact, if they choose to go and try these matters of fact, I rarely believe in preventing them being heard and disposed of. I allow a very liberal conduct of the trial, so that the matters in dispute may be fully debated and settled either by myself as judge, or by myself presiding over the jury, who are of course judges of the fact. Now in this case the witness was presented to the judge at a stage when, under the old practice, no judge would probably have acted other than Mr. Justice Cooper did. The judge would have said it was too late. He would not have allowed the evidence to go in, or, if he had allowed it to go in, he would at that late period have looked upon it with considerable suspicion, and for this reason: all the evidence in this case had been closed, and counsel had actually addressed the jury. Now the particular defect which the witness was wanted to meet might have been suggested by counsel on one side or another in his address. Counsel might have pointed out some weak spot in the plaintiff's case, and to supply it this witness might have been called forward. I do not say there was the least impropriety in this case, but if he had been called there would be a suspicion that he (the witness) having observed the course of the trial presented his evidence, and

there would be danger of it being false evidence. The judge has to act with very great care in such matters. It is not possible, at any rate it is extremely difficult, for judges sitting after this lapse of time, not having heard the conduct of the trial, or the demeanour of the witnesses, and not knowing the local circumstances, to say that the judge in this case exercised his discretion improperly, that he in any way defeated the ends of justice by exercising the discretion which was undoubtedly his to use in the proper and effective trial of this action. There was a further question for the judge besides this suspicion, doubt, and difficulty which, however, we are not called upon to consider here. The further question is this. Assuming that that evidence had been admitted, is there a strong probability that the result would have been different? I myself confess I have listened with very great care and attention to what has been said on each side, and I am not able myself to say that there was a very strong or any great probability that the result would have been different from that which the judge and jury came to on consideration of the case. Unless I am satisfied that there would have been a different result if I sent it down now for a new trial, and this evidence being admitted would make a material difference and cast the scale righteously on the other side, I ought not to say that the judge was wrong in not receiving this evidence, and we ought not to overrule his discretion exercised against it and give a new trial for the purpose of having this evidence taken. If there is no reasonable probability—no strong probability—of a different result, it would be only wasting another large sum of money on re-hearing a case which has already, no doubt, cost a large sum of money. I think, therefore, on that point that it would be improper to interfere with this exercise of discretion on the part of the judge. It must be remembered—and I say this for the benefit of my younger brothers of the profession at the Bar—that the judge sitting at the trial has a large discretion, and exercising it with solemn seriousness, he has one thing before him, and that to endeavour that everything legally re-

ceived and properly weighed in the interests of justice is received and not excluded. That is the one point, and I do not think there is any doubt that the judges presiding in the courts of Her Majesty's dominions are anxious that that line of conduct shall be pursued. Upon that I am unable to see any ground for the granting of a new trial. Then we come to this. Undoubtedly if the finding is to stand as it is the judgment must stand. There can be no re-trial of the case here, if before the minds of the jury there was reasonable evidence, evidence at all events upon which reasonable men might act in coming to the findings which they have recorded in this matter. I do not propose to go into the evidence. I think it would be a waste of time, at all events a waste of time in the way of re-hearing or re-trial of this case. Suppose I went into the whole matter which was before the jury, and suppose I should come to the conclusion that if I had been on the jury I would have come to a different verdict, it would be of no consequence whatever, unless I could, looking at the jurors and the findings of the jury, say that they ought not to have come to the conclusion which they came to, and which would be different to that which I had come to after examining the evidence here in this Court to-day. If men exercising reasonably the faculties which they have as jurors to exercise in judging upon facts could have come to the conclusion which the jurors have come to—although I, reasoning possibly (I do not say actually) with greater power of mind, with greater experience, wider knowledge of the world, and more deliberate and careful knowledge of the facts, might have come to a better conclusion—we have allowed it to be, and it is law, and ought to be law, that we ought not to disturb their findings. We know very well in the course of human life, and especially in the experience of courts of justice, if you present the same state of facts to two, three, four, and five different juries, the probability is that you will have a different conclusion from each one, and different shades of finding upon different issues; and, in fact, if you go on there would be no end in the course of the investi-

gation between the parties. There must be finality, and that finality is best found in saying when there was evidence upon which reasonable men might have acted, although I might myself have acted differently from the jury. "Well, they have founded their verdict upon that reasonable degree of evidence, and it must stand." So that I do not propose to re-hear the evidence as to the questions of the £90, the larger amount of £2,357 10s., or the £195 12s. 6d. As to the £40 10s., I think there was want of authority there. They could not reasonably come to the conclusion that Beatty (defendants' agent) had the authority to take up country or pay for country in that way. Although I have not a very strong opinion on the matter, I think there was a lack of authority there, and I think defendants ought to have the benefit of that. The Attorney-General contended that there was not that reasonable degree of evidence upon which the jury ought to have acted. I cannot agree with him there. I think there was evidence upon which reasonable men might have come to the conclusion that they have done. There was sworn testimony upon which they might have acted, and I do not think their verdict should be disturbed. Under these circumstances, if I am right, I think the rule ought to be discharged with costs, except as to the £40 10s., which should be deducted from the amount to be paid to plaintiff.

HARDING and REAL, JJ., concurred.

Judgment by consent for £40 10s. in favour of defendants.

Rule discharged with costs, except so far as they had been increased by the claim to £40 10s.

Solicitors for plaintiff: *Roberts & Roberts*.

Solicitors for defendants: *Hart & Flower*.

O'CONNOR v. SHERIFF OF QUEENSLAND.

New trial — Excessive damages — Liability of Sheriff for mistake of officer — Bona fides.

The bailiff at Hughenden levied a writ of *feri facias* on the goods of the plaintiff to satisfy a judgment against the plaintiff's sister. The bailiff was informed that

the goods belonged to the plaintiff and not to his sister. The bailiff entered into possession, no inventory was taken, and the bailiff withdrew after five days. No evidence was given of damages. The defendant paid £5 into Court, and adduced no evidence. The action was tried before Chubb, J., and a jury. Chubb, J., directed the jury that in assessing the damages the jury were not to consider the motives (if any) which actuated the execution, unless there was a gross outrage and abuse of the proceedings of the Court, and the jury awarded £150 damages, and judgment was entered accordingly. On appeal to set aside the judgment on the ground of excessive damages, the judgment of the Court below was affirmed; it being held that, as no evidence was tendered in mitigation of damages, the Court was not justified in saying that the jury were manifestly wrong, or that the damages were such as reasonable men should not have given.

Semble, the Sheriff should have interpleaded on getting the notice from the plaintiff.

MOTION to set aside a judgment in favour of the plaintiff on the ground that the damages were excessive, and the verdict contrary to the evidence; or, that the damages should be reduced to £5, or judgment entered for the defendant.

The facts appear from the judgment.

Byrnes, S.G., and Conlan, for the Sheriff. *Power*, and *W. A. D. Bell*, for the respondent.

Byrnes: This case raises an important question with regard to the process of the Court, and the liability of the Sheriff for the acts of his officers. [HARDING, J.: He takes goods in execution at his peril. It is in his choice whether he does it or not.] If there are goods and he fails to take possession of them he would be liable for making a false return. [REAL, J.: He has the right by law to interplead. If after he has taken possession of goods the execution creditor does not come in, the execution creditor is barred against any future action against the Sheriff. LILLEY, C.J.: If the Sheriff does not interplead he does not get the protection of interpleader.] I am not disputing the liability to nominal damages. [LILLEY, C.J.: I always understood that the Sheriff seizes at his peril.] If the Sheriff did not act *bona fide* the Court might allow exemplary damages, and being an officer of the Court might deal with him on its own motion. If he acted *bona fide* he was entitled to the protection of the Court against

outrageous damages which might be given by the jury. In this case the Sheriff was acting *bond fide*, and the jury gave the plaintiff £150 damages, having apparently come to the conclusion that a gross outrage had been committed. There is no foundation for that, *Gregory v. Showman*, 1 E. and B., p. 360; and *Lee v. Dangar and others*, 8 Times L.R., p. 494. On these authorities the damages were absolutely unreasonable, and £5 which had been paid into Court was ample compensation for all the injury that the plaintiff had suffered.

Power: The verdict ought not to be disturbed. [LILLEY, C.J.: I hope from the great respect shown to juries in this colony they will not run amuck, so to speak, on the matter of damages. I am not prejudging you as to the fact. I think in a previous case the Court has hinted that although we give this very great power to the juries they are not to consider themselves absolute masters of the situation, and if we see absolute injustice we will intervene with the authority of the Court.] The verdict was not by any means an unreasonable one. The Crown said that £5 was sufficient damages, but the jury had all the facts before them, and they had careful direction from the judge, and they found that that amount was not sufficient. Mr. M'Groarty acted with a very high hand indeed; his conduct and that of his bailiff was calculated seriously to injure O'Connor in his business. It was impossible for a man to say what was the actual amount of damage he suffered by the Sheriff taking possession of his premises. It might not do a professional man much damage if half-a-dozen bailiffs were put in. It was quite different with a tradesman, who might be seriously injured in his business and his credit by an execution being put into his premises. The case is analogous to a case of defamation. It was for the jury to say whether, under all the circumstances of the case, the man was entitled to a certain amount of damages. That being so, it was peculiarly one of those cases in which business men were competent to say what effect the bailiff sitting on your doorstep for five days would have. The plaintiff was a hairdresser and tobacconist,

and it was important to consider that, as showing the strong improbability of the bailiff's *bona fides*, because his sister, who was the debtor, was a dressmaker. The plaintiff had nothing to do with the drapery business at all. The debt to Scott, Dawson, & Stewart, no doubt, was for goods supplied to Miss O'Connor as dressmaker. It was not pretended that they supplied goods of a similar kind to the plaintiff's stock. The bailiff, Mr. M'Groarty, lived in Hughenden, and as plaintiff so far back as August, 1889, had advertised that he had opened "a hairdresser's saloon and imported a thoroughly practical barber from the South," must have been aware of plaintiff's position. There was nothing to show that he was not aware of it. If that were not sufficient to show that Miss O'Connor had no connection with her brother's business, it was in evidence that she had relinquished the drapery business and had removed to a cottage near her brother's shop, and intended to carry on business there as a dressmaker. It might be fairly assumed that the Sheriff's bailiff knew all those things. There was the grossest carelessness on his part, and he was equally liable for that as he was for want of *bona fides*. Having been put on enquiry, as he must have been by his knowledge of the position of the parties, he could have sent an urgent telegram to the Northern Sheriff, or to Scott, Dawson, & Stewart, for further instructions, and got a reply in half-an-hour. He was warned on the day before the seizure, but there was nothing to show that he put himself into communication with either the Sheriff or the execution creditors. [LILLEY, C.J.: He has not taken the trouble to say that he exercised diligence in making inquiries, and the jury might infer that he did not make a mistake, but chose to risk it. If he did that he would be liable to damages.] The plaintiff was carrying on a business of a totally different kind to that of his sister, and that must have been known to the bailiff, and he had not taken the trouble to show that he did not. [LILLEY, C.J.: That is the defect. He does not appear to have come forward to throw any light upon it.] The

plaintiff stated in his evidence that the bailiff's man remarked while in possession, "Things are very quiet now; I don't know whether I am keeping them out." Yet the bailiff was not called to give evidence. [LILLEY, C.J.: No one was called to show whether the bailiff acted in good faith, or whether he took reasonable precautions.] The cases of *Merest v. Harvey*, 5 Taunt., 442; *Praed v. Graham*, 24 Q.B.D., 53; *Glasspoe v. Young and others*, 9 B. & C., 696; *Gregory v. Cotrell and Swift*, 23 L.J., Q.B., 33; *Emblem v. Myers*, 30 L.J. Ex., 71, were cited. The evidence was overwhelmingly on the side of the plaintiff, and he was entitled to retain his judgment.

HARDING, J.: This is an action brought by Alexander O'Connor against the Sheriff of Queensland to recover damages in consequence of a trespass alleged to have been committed by the Sheriff. An execution had been obtained in the action of Scott, Dawson, & Stewart against Victoria O'Connor, and that execution was given to the Sheriff for realisation. That execution being in the hands of M'Groarty at Hughenden, he proceeded to execute it under the following circumstances:—Before August, 1889, the execution debtor, Victoria O'Connor, had been carrying on the business of draper and milliner in Hughenden, but after that time she withdrew from the business and from the place. Her brother, Alexander O'Connor, the plaintiff in this action, in the same premises started a hairdresser's saloon, tobacco business, and stationery and other things, and in the Hughenden *Ensign* of 18th August, 1889, he advertised that circumstance. On 22nd August she advertised in the same paper that she had relinquished the drapery business and had removed to the cottage immediately at the rear of Green & Co.'s office, where she stated she was prepared to execute all orders in dressmaking. And then there is a clearing-out sale of her goods advertised on 15th August with the usual bargains, &c. From that time the plaintiff kept in the paper a further advertisement as to the business he was carrying on. Now, Mr. M'Groarty was the police magistrate at Hughenden, and it is impossible to suppose for

one instant that he did not know what was going on in the principal street in the place, and what advertisements were appearing in the paper. At all events these were the circumstances when he received the writ of execution for service, and having got that for the purpose of levying, he met Alexander O'Connor on the evening of the 31st August. M'Groarty said, "I have an execution against Victoria O'Connor." Plaintiff answered, "There is no such person." M'Groarty then said, "Your sister, I mean." Plaintiff in his evidence said, "I objected to him going into my shop, or touching anything in it, as everything there belonged to me." M'Groarty said, "I am supposed to believe that Miss O'Connor has an interest in this business." Next morning there was a knock at plaintiff's door, and, opening it, M'Groarty with a bailiff came in. Plaintiff said, "I object to your coming in." There was some further conversation, and M'Groarty again repeated, "I am supposed to believe that Miss O'Connor has an interest in this business." I may say that when a man tells me not "that I believe so" but "I am supposed to believe," I would not believe that he did believe it, and I would sympathise with any jury that took the same view. Mr. M'Groarty is then reported to have said, "Don't keep fighting with me, or I will make it hot for you. Go to your solicitor." Plaintiff followed his advice, and when he returned and spoke to M'Groarty the latter said, "Don't bother about the matter; you have your remedy." He then got a notice from plaintiff claiming the property which had been seized as his own. Now upon that, in my opinion, the Sheriff might have applied for an interpleader, and would have obtained it; but he did not. Plaintiff asked him when he intended to withdraw the bailiff, and he said he did not know, not having heard from Townsville, adding, "It is only a try on, and that is a common occurrence." Further, plaintiff gave evidence that the bailiff told him that he heard people make remarks as they passed the shop, and he did not know whether he was keeping them out. Then there was evidence of what the profits

of the shop were, and that they decreased after the execution. Upon that the jury found a verdict for the plaintiff with £150 damages. The question is whether that will stand. The Solicitor-General, on behalf of the Sheriff, has moved under the new rules to-day that this particular judgment shall be set aside on the ground that the damages are excessive, and that the verdict was contrary to the evidence; or that the damages should be reduced to £5, or that judgment shall be entered for defendant. The case has been argued. Now, I am of opinion that where the Sheriff appears as a wrong-doer, the damages against him are regulated by the same principles as they are against other persons, but he is allowed to show in mitigation certain facts which other persons are not allowed to show. Now, if the Sheriff commits a tort he is liable to the same damages as another person unless he can mitigate them. The jury, in weighing the amount of damages, may take into account not only the injury and responsibility, but probably the injury to the feelings of the parties injured, and the animus as well as the circumstances in aggravation or mitigation. In this case the Sheriff has not in any way tendered evidence in mitigation of damages, but we have some evidence, which I have referred to, given by plaintiff in respect of these damages; and the question is whether in the face of the Sheriff having stood by and having declined to say anything at all in respect of mitigation of damages, the jury were not justified in believing the plaintiff's statement, and whether, if they did so, £150 is such damages as such a tort will not sustain in this case. I cannot say on the face of it that they are manifestly wrong, or that they have brought in such damages that reasonable men should not have brought in. Consequently I am of opinion that the motion must be dismissed with costs.

LILLEY, C.J., and REAL, J., concurred.

Solicitor for appellant: *J. Howard Gill*, Crown Solicitor.

Solicitors for plaintiff: *Daly & Schacht*.

RAVEN v. KESTERTON.

Prohibition—District Courts Act 1891 (55 Vic., No. 33), ss. 152, 153—Justices Act (50 Vic., No. 17), ss. 237, 238—Appeal.

On an appeal to the District Court from the decision of justices, an objection was taken and upheld that, as no notice of trial had been given to the respondent the judge had no jurisdiction to hear the appeal. The appeal was brought on for hearing at the next sitting of the District Court and the decision of the justices reversed. On an application for a prohibition to the District Court Judge, it was held that the judge had no jurisdiction to hear the appeal on the second occasion, as no adjournment had been made, and the parties did not consent to the jurisdiction.

Held, also, that sec. 152 of *The District Court Act* means that only the proceedings after the rule nisi has been granted must be in the nature of an appeal duly brought from the judgment of a District Court judge. The order of the justices was restored.

MOTION for a prohibition.

In this case justices had made an order against Kesterton in the South Brisbane Police Court. He appealed to the District Court, and Paul, J., dismissed the appeal as no notice of trial had been given. The appeal came on again at the next practicable Court, when Paul, J., reversed the findings of the justices, and gave judgment for Kesterton, and quashed the conviction.

Raven obtained an order nisi for a prohibition.

Feez, for the plaintiff, moved the rule absolute. *Jodrell*, for respondent, to show cause.

Feez raised a preliminary objection that when the appeal was dismissed the first time for want of notice, the judge's jurisdiction had gone, and he had no power to make the order on the second occasion.

Jodrell, contra.

LILLEY, C.J., delivered the judgment of the Court as follows:—The first question for our consideration is whether this present proceeding has been rightly founded. That depends upon our construction of sections 152 and 153 of *The District Courts Act*. Now, section 152 says:—"When an application is made to the Supreme Court, or a judge thereof, for a writ of prohibition addressed to a District Court, the judge of the District Court shall not be served with notice, and shall not,

except by the order of a judge of the Supreme Court, be required to appear or be heard on the application, and shall not be liable to any order for the payment of the costs thereof, but the application shall be proceeded with and heard in the same manner in all respects as a case of an appeal duly brought from a judgment of a judge. Notice of the application shall be given to, or served upon, the same parties as in the case of an order made or refused by a judge in a matter within his jurisdiction." Well, I did not think it necessary on granting this rule to trouble the judge of the District Court, so that he is not to be considered in the matter. The main question now is whether the proceeding has been rightly founded, and what is the meaning of this latter part of section 152, "That it shall be proceeded with and heard in the same manner in all respects as a case of an appeal duly brought from a judgment of a judge." If that meant all the proceedings on an appeal from a judgment of the District Court ought to be followed, well, then, there would have to be security for the costs of the appeal, and there would have to be notice as provided by section 144 of *The District Courts Act*. But I do not construe section 152 in that way. I think it would be rather difficult to administer this section 152, if, after going to a judge of the Supreme Court to get a rule, you are then to go back to the District Court to give security, and notice of appeal, and so on. I think the more reasonable way of reading section 152 is this, that when you have upon sufficient ground obtained a rule from a judge of the Supreme Court, then the further proceeding in the matter must be in the nature of an appeal, duly brought from the judgment of the judge of the District Court. The section seems to consider that by getting the rule of a judge of the Supreme Court you have the status of a person who has duly brought an appeal from the judge in a matter within his jurisdiction. In this case the allegation is that it was outside his jurisdiction. I think there is nothing fresh in section 153. It simply lays down the practice, which is not of any concern to-day, and it is not

necessary for us to deal with it. The question is what judgment ought to pass upon the merits or upon the technical objection by the applicant for the rule in this case. The Act which goes to the very foundation of the proceeding is an Act to prevent tenants clandestinely removing goods which would be subject to distress. There was an order made against Kesterton in the Court below—the Magistrates' Court—from which he appealed to Mr. District Court Judge Paul. When that appeal was brought up an objection was taken that there had been no notice of trial, and the judge upheld that objection, and the appeal came on at the next practicable Court. If the original order had been made under section 237 of our *Justices Act* it was entirely within the jurisdiction of Judge Paul. Section 238 is the section which seems to me to govern this rule on the question of jurisdiction—"The appeal shall be heard at the District Court held nearest to the place of the original hearing"—that is the district of Judge Paul—"and at the next practicable sitting thereof, unless by the consent of parties," &c. Now, the statute of 11 *Geo. II.*, c. 19, which was the origin of the whole, gave the party who was aggrieved leave to appeal to the next Court of Quarter Sessions. Well, this section 238 gives a similar right of appeal here, and as I read that section the District Court at which Judge Paul dismissed the matter because notice of trial had not been given was the next practicable sitting after the making of the original order. Having done that, he, in my opinion, had no further jurisdiction, unless he continued it either by consent of the parties, by an adjournment which he might have made, or by specific order of Court that he would hear it at the next sittings. His power of adjournment was inherent in the Court, and I read the section as prohibitory that, unless he preserves his jurisdiction by some order, by something that the Court had authority to do, or by specific order that the case should be heard again, his jurisdiction is gone. Well, I think the evidence on that is pretty clear. He made no order reserving his jurisdiction, or the rights of the parties after the

next Court, but at the next Court he proceeded to hear it. Then, in my opinion, it was too late for him to make this order under section 238. His jurisdiction was gone and he could make no order. That being so, there will be no rule for the issue of the writ, but we can give judgment as we might in a case of appeal under section 152. Our judgment will be that the second order of the District Court be reversed, and that the order of the justices be restored, with costs to the applicant.

Solicitors for plaintiff: *Foxton & Cardew.*

Solicitor for defendant: *P. Paul.*

BRISBANE CRIMINAL SITTINGS.

HARDING, J.: 29th August, 1892.

REGINA v. HORROCKS.

*Criminal law—Evidence—Untrue representation
Evidence and Discovery Act of 1867 (31 Vic.,
No. 13), s. 64—Burden of proof.*

H. was arrested on a charge of murder. He asked the arresting constable, B., whether human blood could be distinguished from any other blood. B. said "Yes, it could."

Held, that the representation was untrue, and any confession or statement made by the prisoner subsequent to such representation could not be admitted in evidence against the prisoner. A detective untruly told the prisoner the murderer could be identified.

Held, that no conversation with the prisoner subsequent to such representation could be received under sec. 64 of *The Evidence and Discovery Act*. The onus is on the Crown of rebutting the presumption that the subsequent statements of the prisoner were induced by the representation.

INFORMATION against Francis C. Horrocks for murder.

Power prosecuted for the Crown. *Lilley*, and *Conlan*, for the prisoner.

On the first day of the trial Detective Grimshaw gave a conversation with the prisoner, which was received. He then deposed that he told the prisoner "the murderer can be identified." This being an untrue representation, further conversation was rejected. On a later day of the trial,

Boyle, the arresting constable, deposed that, before the arrival of Detective Grimshaw, the prisoner and he had a conversation; that the prisoner asked him "Can they distinguish human blood from any other blood?" and he answered "Yes."

Lilley objected to the reception of any subsequent conversation on the ground that this was an untrue representation.

HARDING, J., upheld the objection pending an answer from a scientific witness.

Robert Mar, the Government Analyst, deposed in answer to a question from Harding, J.: "If the question as asked—Can they distinguish human blood from any other blood?—yes, is not a true answer according to the present state of science."

It was in evidence that Boyle's untrue representation preceded the statements of the former to Detective Grimshaw.

Lilley thereupon moved that so much of the evidence already given as went to prove a confession made by the prisoner after the above statement made by Boyle, should be struck out from the judge's notes on the grounds that there was a false statement amounting to a representation, and that, therefore, any confession after that must be deemed to have been induced by it, unless evidence to the contrary existed, and there was no evidence. *Evidence and Discovery Act*, s. 64.

Power: There is nothing to show that the subsequent statements were induced by Boyle's statement.

HARDING, J.: It would be well if all constables and others in control of a prisoner would give the statutory caution to him upon taking him over from another's charge. This is especially necessary here, as section 64 of *The Evidence and Discovery Act* is peculiar to Queensland. I hold that such evidence must be struck out as occurring subsequent to an untrue representation, and that the onus is thrown on the Crown of rebutting the presumption that the subsequent statements of the prisoner were induced by the representation.

Solicitor for prisoner: *E. W. Goerts.*

REGINA v. FRANZ.

HARDING, J.: 1st September, 1892.

The Offenders Probation Act of 1886 (50 Vic., No. 14), s. 3—Two informations presented simultaneously—Previous conviction.

Two informations were presented against F. for cattle stealing. F. pleaded guilty to both, and asked the extension of *The Offenders Probation Act*. He was sentenced to eighteen months' hard labour on each information, the sentence being suspended on the first.

Held, that as he was convicted under the first charge, the benefit of the Act could not be extended to the offence contained in the second information.

INFORMATION against Franz for cattle stealing.

Power prosecuted; Rutledge, for prisoner.

Two informations were presented against the prisoner for cattle stealing. He pleaded guilty to both.

Rutledge called evidence of character and asked that the prisoner might have the benefit of *The Offenders Probation Act*. The prisoner had not been previously convicted.

HARDING, J.: Here are two informations. If he is sentenced on the first he is convicted, and how can I extend the benefit of that Act to him on the second. Sentence—eighteen months' imprisonment with hard labour on the first information, to be suspended upon prisoner entering into his own recognizance in £80 before a Justice of the Peace, under the terms of *The Offenders Probation Act*; eighteen months' imprisonment with hard labour upon the second information.

Solicitors for prisoner: Atthow, Bell & Stumm.

 SEPTEMBER SITTINGS OF THE FULL COURT.

REGINA v. DUNCAN.

Crown case reserved—Embezzlement—Larceny—General verdict—29 Vic., No. 6, s. 77.

A prisoner was charged with embezzlement, the facts shewed a case of larceny, the jury brought in a general verdict of guilty, and the prisoner was sentenced; but the sentence was suspended at the request of the prisoner's counsel to reserve the question.

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Held, that the question might be raised at any time before sentence, that the conviction must be reversed, the judgment vacated, and bail released.

Reg. v. Gorbutt, Dears & B., 168, followed.

CROWN case reserved, stated by Mr. District Court Judge Noel.

The prisoner was charged at Townsville on an information for embezzlement. The judge directed a case of larceny. The jury brought in a general verdict of guilty.

Macnaughton, for prisoner, submitted the proceedings should be quashed. The prisoner was sentenced, but the sentence suspended pending the decision of the question raised by Mr. Macnaughton.

Power, for the Crown, referred to section 77 of *The Larceny Act of 1865*, where, on an information for embezzlement, a prisoner may be found guilty of simple larceny, or larceny as a servant. [LILLEY, C.J.: That means a special verdict is required.] There is a similar case *Reg. v. Gorbutt*, 26 L.J., (M.C.), 47. The only question is whether the objection was too late. [REAL, J.: How was it too late? It could not have been made before the verdict.] The prisoner's counsel might have asked the judge to so direct the jury.

HARDING, J.: We have decided that a point may be taken at any time during the trial, in *Reg. v. Pieremont*, 2 Q.L.J., 95, so long as the prisoner has not been removed.

Lilley, for prisoner, was not called upon.

LILLEY, C.J.: Verdict was tantamount to finding the prisoner guilty of embezzlement. The facts amounted to larceny. The conviction must be reversed, the judgment vacated, the prisoner discharged, if in custody, otherwise the bail to be released.

HARDING, COOPER, CHUBB, and REAL, JJ., concurred.

Solicitors for prisoner: Powers & Robinson, agents for O'Malley, Townsville.

LILLEY v. RIGBY.

Practice—Appeal—Non-appearance of appellant—Dismissal of appeal.

When an appeal has been set down in the ordinary course and is in the paper for hearing, if the appellant does not appear, the respondent is entitled to have the appeal dismissed with costs.

Ex parte Lows, 7 Ch. D., 160, followed.

APPEAL from a judgment of nonsuit by The Chief Justice.

On the cause being called on at the hearing there was no appearance for the appellant.

Sir S. W. Griffith, Q.C., A.G., and *Lilley*, for the respondent, applied to have the appeal dismissed with costs.

HARDING, J.: The appeal must be struck out.

Griffith, Q.C., A.G.: I submit the appeal should be dismissed with costs. We have been brought here to answer an appeal, and want our costs. [REAL, J.: By the new rules copies of the judge's notes must be delivered, and that has not been done. COOPER, J.: Is not the appearance of the appellant a preliminary condition to hearing the appeal?] If the appeal is struck out we should have to make a fresh application for costs. When the appeal has once been set down the parties cannot consent to its withdrawal. *Annual Practice*, 920, 921.

HARDING, J.: The result would be much the same, as the appellants would be out of time, and could not appeal a second time. In *ex parte Lows*, 7 Ch. D., 160, the appeal was dismissed with costs for want of appearance by the appellant, which seems to settle the practice. Appeal dismissed with costs.

COOPER, CHUBB, and REAL, JJ., concurred.

Solicitors for respondent: *Chambers, Bruce & McNab*.

THE QUEEN v. THE GYMPIE GREAT EASTERN GOLD MINING COMPANY, LIMITED.

Company—Head office or chief place of business—Mining company—Dividend duty—Date of return—54 Vic., No. 10, ss. 3, 6, 7, 8, 10, sub. 3.

A company was formed in London for the purchase of a gold mine at Gympie, in Queensland. The company was governed by a board of Directors, who met at London, where the registered office was. The directors delegated to T. H. Sym and F. I. Power, of Gympie, as their attorneys, the management of the business in Queensland. All the mining operations of the company took place at Gympie, and all the profits of the company were earned at Gympie, and transmitted to London, where the dividends were declared. The company was registered in Queensland under *The British Companies Act of 1886*, and had a registered office at Gympie. The company carried on no other business. The capital of the company consisted of 210,000 fully paid up shares, of which 90,000 were held by persons in Queensland.

Held, that the defendants were a company carrying on the business of mining in Queensland, and were liable to pay duty on all dividends declared, and that the duty should be paid, and the return in connection with the duty made within seven days from the declaration of the dividend, as provided by s. 7 of *The Dividend Duty Act*.

Held, also (Chubb, J., dissentiente), that the chief place of business of the company was in Queensland.

Per CHUBB, J.: The chief place of business was at London, and the return could be made at any time before the first of April, as in section 8 of that Act provided. *Cesena Sulphur Co. v. Nicholson*, 1 E. & D., 428, etc., discussed.

SPECIAL case stated by consent of the parties for the opinion of the Court.

The facts stated in the case shewed that the action was commenced by a writ of *capias* under *The Crown Remedies Act of 1874*, on 4th December, 1891. The special case set out that the Gympie Great Eastern Gold Mining Company, Limited, was formed for the purpose of acquiring a gold mine at Gympie, and working and developing the same. The company was registered as a joint stock company in London, under the provisions of *The Companies Acts, 1863 to 1886*, on or about 23rd June, 1887, and in Brisbane, under the provisions of *The British Companies Act of 1886*, on or about 3rd November, 1887. The registered office of the company in England was at 5 Queen Street Place, London, and in Queensland, at Mary Street, Gympie. In or about 1887 the company acquired the Great Eastern Gold Mining Company at Gympie, and from that time up to the present had been engaged in working and developing the same. The board of directors

appointed Mr. F. I. Power, solicitor, and T. Hood Sym, manager of the Queensland National Bank, at Gympie, as their attorneys to manage the affairs of the company at Gympie. These gentlemen appointed John James, of Monkland, as mining manager, and Samuel Caston as secretary, and on the 11th February, 1891, notified the Colonial Treasurer as to those appointments. All the mines of the company were situated in Queensland, and all the operations of the company connected with the business of gold mining were wholly and exclusively carried on at Gympie where the profits of the company (if any) were earned and immediately forwarded to London to the board of directors for distribution as they might decide. Besides this the company carried on no other business. The capital of the company consisted of 210,000 fully paid-up shares of £1 each, and 90,000 of those shares were issued to the vendors of the mine. On or about 20th March, 1891, the secretary of the company forwarded a return to the Colonial Treasurer purporting to be made under *The Dividend Duty Act of 1890*, setting forth that the company on 30th October, 1890, declared a dividend amounting to £2,250, and the secretary forwarded the sum of £52 15s. as the amount of duty payable on the dividend. The total amount of the dividend declared on the date mentioned, however, amounted to £5,250. The sum of £2,250 was estimated as the proportionate amount of the dividend which was payable in respect of the 90,000 shares held in Queensland. The assets of the company during 1890 and 1891 consisted of the gold mine and machinery, and appliances in connection therewith, and the gold from time to time extracted therefrom, and the proceeds thereof awaiting transmission to London. The assets of the company out of Queensland during the same periods consisted of office furniture not exceeding £1000 in value, and the money remitted to the directors from time to time. About 21st July, 1891, the company declared a dividend of 1s. per share, amounting to £10,500, but no return in connection with such dividend had been forwarded to

the Colonial Treasurer, or duty paid thereon, it being claimed that, as the company was a foreign company such return was not required to be made until 1st April, 1892. It was contended on behalf of the Crown that the defendant was liable to pay on all dividends declared by the company since the commencement of *The Dividend Duty Act*, and that the returns relating thereto, and the amount of duty payable, should be forwarded to the Colonial Treasurer within seven days of the declaration of such dividends. The defendant company submitted on the other side that it was a foreign company having its head office or chief place of business in London, and was liable to pay duty at the rate of one shilling on every twenty shillings, and a proportionate sum for every part of twenty shillings, of so much of the total dividends declared during the year as was proportionate to the value of the assets of the company during the year as compared with the value of the total assets of the company wherever situated, including the moneys from time to time awaiting distribution in England. The defendant company further contended that they were at liberty to make the returns in connection with the dividends declared, and forward the duty payable at any time before the 1st April in the year subsequent to the declaration of such dividends. They further contended that they were not liable to pay duty in respect of any dividends paid to the holders of shares who were not resident in Queensland.

The questions submitted for the opinion of the Court were as follows:—(i.) Is the defendant company a foreign company?—(ii.) Is the defendant company a company having its head office or chief place of business in Queensland?—(iii.) Is the defendant company a company carrying on in Queensland the business of mining within the meaning of *The Dividend Duty Act of 1890*? (iv.) On what proportion of the dividends declared by the company is duty to be paid, and how is such duty to be assessed?—(v.) Within what time from the declaration of any dividend by the said company are the returns and duty payable on such dividend to be forwarded to the Colonial

Treasurer?—(vi.) By whom are the costs of this application to be paid?

Sir S. W. Griffith, Q.C., A.G., Byrnes, S.G., and Mansfield, for the Crown. *Power*, and *Scott*, for the defendant.

Griffith, Q.C., A.G.: The case is under *The Dividend Duty Act of 1890*. Proceedings were commenced by writ of *capias* on 4th December, 1891. The Act dates from 19th September, 1890. Section 6 refers to a company having its head office or chief place of business in Queensland, and section 7 is an extension of that section. The time of the return is mentioned. The section requires the return to be "forwarded" within seven days; it does not say "reach" the Colonial Treasurer within that period. There is a proviso to section 7 relating to companies carrying on business outside Queensland as well. Section 8 deals with foreign companies whose chief place of business is not in Queensland. Section 9 provides an artificial rule for determining the capital in such cases. Section 10 deals with mining companies. There is no distinction. Subsection 3 requires duty to be paid on all dividends. The defendants carry on the business of mining here. They should pay on all dividends. [*REAL, J.*: If they are a mining company the other sections are not applicable. *LILLEY, C.J.* We have decided in the case of *The Queen v. Walsh*, ante p. 192, that duty is to be paid on the money earned in Queensland, which, in this case, is the gold obtained from the mine.] There is a registered office here. The only case resembling this appears to be the *Keynsham Blue Lias Lime Company v. Baker*, 2 H. & C., 729, which turned on the meaning of the word "dwell." Duty is payable on the whole dividends.

Power: The chief place of business of the defendants is undoubtedly at London. Section 3 defines a foreign company. In *Lindley on Companies*, 5th edit., 911, it is stated that "By the principal place of business is meant the place where the administrative business of the company is conducted; this may not be where its manufacturing or other business operations are carried on."

By article 77 of the Articles of Association, the board of directors in London can delegate their powers. The facts in this case are very similar to those in the *Cesena Sulphur Company v. Nicholson*, and *Calcutta Jute Mills Company v. Nicholson*, 1 E. & D., 428. The Articles of Association are almost identical. [*HARDING, J.*: I notice that paragraph 3 (d) of the Memorandum of Association states that one of the objects of the company is to carry on the business of mining, etc., in accordance with the agreement to acquire the mine.] There is a similar provision in the cases just cited. All the important business of the company, such as allotting shares, making calls, declaring dividends, etc., takes place at London. The board can revoke the appointment of their officers. The chief place of business is in London. In the *Cesena Sulphur Co. v. Nicholson*, 1 E. & D., at p. 446, *Kelly, C.B.*, says: "There is no shadow of authority to shew that a place in which the governing body, the directors, meet, and where the shareholders at large hold their general and special meetings, and exercise their power of transacting the business, is not the principal seat of business, and the place at which, in the language of the Statute, the company may be said to reside." *Huddleston, B.*, at p. 454, says the substantial business is carried on in England, and at pp. 455, 456: "I think that the main place of business of the company is in England, and that there is at Cesena merely an agency, as it were, of the principal house, that agency being confined to the manufacture and sale of sulphur, but under the direction of the principal house." [*CHUBB, J.*: Is there any authority to shew that the terms "head office" and "chief place of business" are synonymous?] Yes. In *Colquhoun v. Brooks*, 14 App. Ca., 510. Lord Herschell referring to this case says: "There the head office, and therefore the principal place of business of the company was in England." [*HARDING, J.*: The words here are in the alternative, and different. If they were meant to be the same, the word "and" ought to have been there.] The words of the Act are unimportant so long as the facts shew that both

the head office and the chief place of business are in the same place. *The Imperial and Continental Gas Association v. Nicholson*, 37 L.T., (N.S.), 722, is to the same effect. [CHUBB, J.: If the company had a gold mine in New South Wales, where would the chief place of business be?] In London; on the authority of the *Cesena Sulphur case*. There is a grave omission in section 10. Payment is to be made on all dividends, but no rate or time for return is specified. Assuming that the defendants are a foreign company, they are only liable to pay duty in accordance with section 8, and the return may be made at any time before the 1st of April in each year, and they submit they should pay duty only on the amount due to the shareholders in Queensland. [COOPER, J.: I suppose the company has to pay income tax in England on these dividends?] Yes; that is certain.

Griffith in reply: The cases cited are not applicable. The question is the interpretation of the present Act. The place of registration is not conclusive of residence. The chief place of business is where the substantial business of the company is carried on. It was decided in *The Queen v. Walsh*, ante p. 192, that duty was payable on all profits earned here. The only asset of the company outside the colony is the furniture of a trifling value.

LILLEY, C.J.: Looking at *The Dividend Duty Act* of this colony, and upon the true construction, it appears to me that this is a company which carries on in Queensland the business of mining, and that the duty to be assessed is regulated by the terms of section 10. The first dividend it appears to me has been paid, and there is no question in respect of the deduction mentioned in the second division of section 10. The amount to be paid will be regulated by subsection 3 of that section. This is a mining company carrying on business in Queensland; and having its chief place of business in Queensland. It is not, it seems to me, a foreign company within the terms of section 8 of *The Dividend Duty Act*. Well, the answers to the questions will be as to the first, "Is the defendant company a foreign company?"—No;

because in answer to the second (ii.) I find that it is a company having its chief place of business in Queensland. Therefore, the answer to the first will be, No; and to (ii.)—"A company having its head office or chief place of business in Queensland"—Yes. Then, as to "A company carrying on in Queensland the business of mining within the meaning of *The Dividend Duty Act of 1890*?" the answer must be, Yes. As to the question "On what proportion of the dividends declared by the company is duty to be paid, and how is such duty to be assessed?" the answer must be, On all. Then, "Within what time from the declaration of any dividend by the said company are the returns and duty payable on such dividend to be forwarded to the Colonial Treasurer?" the answer will be, Within seven days—that is the statutory period.

HARDING, J.: You have The Chief Justice's opinion. For myself I answer—(i.) "No." (ii.) "It has its chief place of business in Queensland;" (iii.) "Yes;" (iv.) "On all dividends;" and (v.) "Within seven days, as provided by section 7."

COOPER, and REAL, JJ., agreed.

CHUBB, J.: I am unable to agree with my brother judges. I think the defendants are a foreign company, having their chief place of business in London; but that they are a company carrying on mining business in Queensland, and, as such, are liable to pay duty on all dividends. The return should be made as provided by sec. 8.

LILLEY, C.J.: The majority of the Court agree with the answers which I have given to the questions. Judgment will be accordingly, with costs against the defendant company.

Solicitors for defendants: *Chambers, Bruce & McNab*, agents for *F. I. Power*, Gympie.

Solicitor for Crown: *J. Howard Gill*.

THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LIMITED v. GRIMLEY AND OTHERS.

Practice—Trial—Order XXXV, rr. 3, 28—Amendment—Crown Lands Alienation Act of 1876 (40 Vic., No. 15), ss. 4, 21, 28, sub-ss. 8, 9, 10, 101—Real Property Act of 1861 (25 Vic., No. 14), ss. 33, 34, 96.

Defendants other than Grimley, viz., McIlwraith, Drury, Hart, and Palmer, constituted the Brisbane board of directors of the plaintiff company from 1882 to 1888. During those years these defendants authorised advances from the company's funds to defendant Grimley, which were secured partly by mortgages on lands in the Darling Downs district, known for the purposes of this action as "the selections" and "the mill lands." In 1887, Grimley being in default, the company took possession of the lands. On 6th September, 1888, the Brisbane board resigned, and the company now sued defendant Grimley upon covenants contained in the mortgages, and sued the other defendants for damages for negligence and malfeasance as local directors, or agents of the plaintiff company, in making the advances to Grimley. On a summons heard in Chambers, The Chief Justice made an order for trial of the action before himself and a jury, but in the same order reserved leave to himself to discharge such jury and try the action himself, if, at such trial, he thought fit so to do. During the trial, and before the close of the plaintiff company's case in reply, leave was granted to amend the Statement of Claim by inserting allegations that the securities taken by the defendants other than Grimley, for advances to the defendant Grimley, were insufficient and worthless, by reason of their having been obtained in contravention of section 21 of *The Crown Lands Alienation Act of 1876*. An application in Chambers to strike out the amendments as embarrassing, irrelevant, and tending to prejudice and delay the fair trial of the action, was dismissed, and defendants then pleaded and demurred to the amended Statement of Claim. The demurrer was ordered to stand over till the motion for judgment. The trial proceeded to a close, and certain questions were submitted to the jury, to some of which no answers were returned, whereupon The Chief Justice discharged the jury; and, on motion for judgment and hearing the arguments on the demurrers, overruled the demurrers, answered the questions submitted to the jury, and gave judgment for the plaintiff company on the question of the insufficiency of the securities, holding that the selections and the mill lands had been obtained in contravention of section 21 of *The Crown Lands Alienation Act of 1876*, to the knowledge of the defendants other than Grimley, and that, therefore, the advances to the defendant Grimley were recklessly and carelessly made. The Chief Justice also held that there was no

necessity to make the Crown a party to the action, on the ground that the plaintiff company did not ask the grants of these lands to be declared invalid.

On appeal to the Full Court (WINDEYER, COOPER, and CHUBB, JJ.) *held*, (reversing LILLEY, C.J.) that The Chief Justice had no power to make the reservation for trial by himself in the order granting a jury; that the amendments should not have been allowed in this case, as being made neither on a *bona fide* application, nor with reference to a matter which the parties originally came into Court to determine.

Held, also, that the demurrers should be allowed, and that, as there was nothing in the dealings of the defendants other than Grimley that was illegal, therefore defendants other than Grimley were not negligent as alleged by the plaintiff company.

Semble: that there is a general right to make objections to a Crown Grant, although the Crown itself does not take the objection, and that a Court may, in determining the rights of parties, be called upon to pronounce as to the validity of a Crown Grant in a suit to which the Crown is not a party, though it may not be able to set it aside absolutely, as in a suit where the Crown is a party.

Semble, also, that on production of a Crown Grant there is justification for assuming that, if anything irregular has been done in obtaining the Grant, the Crown has waived such irregularity.

Held, also, that a conditional purchaser under *The Crown Lands Alienation Act of 1876* has a right to give a *bona fide* mortgage over the conditionally purchased land for *bona fide* advances.

Held, also, that section 21 of *The Crown Lands Alienation Act of 1876* refers only to contracts made with the selector himself, and has no reference to contracts between third parties.

Plant v. Johnson, 7 Vict. L.R. "Law," 457; *Byrne v. O'Callaghan*, 13 Vict. Rep. 924; *Commercial Bank of Australia v. Carson*, 6 Vict. L.R., "Law," 310, disapproved.

Chambers v. Chambers, 2 Vict. L.R., "Equity," 179, and *Tooth v. Power*, L.R. 1891, A.C., 284, distinguished. *Hayward v. Smith*, 9 N.S.W. Rep., "Equity," 11, and *Horsley v. Ramsay*, 10 N.S.W. Rep., 41, followed.

APPEAL from a judgment of His Honor The Chief Justice.

The plaintiff Company on the 26th November, 1888, issued a writ against the defendants Sir Thomas McIlwraith, Sir Arthur Palmer, E. R. Drury, F. H. S. Hart, and Samuel Grimley, indorsed as follows:—

"The plaintiff's claim is against the defendant Samuel Grimley for £63,319 3s. 10d., for advances made by the plaintiff to the defendant Samuel Grimley, and interest thereon, on the security of mortgages made by the defendant Samuel Grim-

ley, and due upon covenants contained in such mortgages, and against the defendants Edward Robert Drury, Sir Thomas McIlwraith, Sir Arthur Hunter Palmer, and the Honorable Frederick Hamilton Scott Hart, for negligence and malfeasance as local directors or agents of the plaintiffs, in and about the making of the said advances to the defendant Samuel Grimley upon insufficient security, for the personal advantage of the defendants, or some of them, and for indemnity against loss occasioned to the plaintiffs by the insufficiency of the said securities."

Appearance was duly entered for all the defendants on the 3rd day of December, 1888, and, after interrogatories, a consent order was signed on the 4th day of September, 1890, for issue of a commission to examine witnesses in England, and that the trial of the cause be stayed until the return of the commission. By further consent orders the time for the return of the commission was extended until the 31st day of August, 1891. On the 29th September, 1891, a notice was filed on behalf of defendants other than Samuel Grimley, that they desired to have the issues of fact tried before a judge and special jury of twelve, and, on the 30th September, 1891, a summons was taken out on behalf of the plaintiff Company for trial of the action without a jury, in pursuance of *Order XXXV*, rule 28. This summons was heard in Chambers before His Honor The Chief Justice on the 16th day of October, 1891, and an order made "that the trial of this action and of the action of The Queensland Investment and Land Mortgage Company, Limited *v.* Drury and others, being action No. 1,345 of 1888, do take place at the Supreme Court House, Brisbane, on Wednesday, the fourth day of November, 1891, and thenceforward from day to day until each of the said actions be respectively tried and concluded, and I do further order (reserving leave to myself to discharge such jury, and to try the said actions, or either of them, without a jury, if at such trial I should see fit so to do), that each of such actions be tried before a special jury of four, and that, for the purposes of such trials, the Sheriff of Queens-

land do summon a panel of forty-eight special jurors, and that the costs, &c."

The hearing was adjourned from the fourth day of November, 1891, until the next day, when *Lilley, Pain and Woolcock* with him, appeared for the plaintiff Company.

Rutledge, holding brief for *Feez*, for defendant Grimley.

Byrnes, S.G., Power, Shand, and Bannatyne with him, for the defendants other than Grimley.

Woolcock read the pleadings.

AMENDED STATEMENT OF CLAIM.

This 15th day of May, A.D. 1890.

1. The plaintiffs are a Joint Stock Company incorporated in England for the purpose of investing moneys in Queensland upon mortgage and having their principal office and board of directors in London. The defendant Samuel Grimley is an Accountant living in Brisbane. The defendant Edward Robert Drury is the General Manager of the Queensland National Bank Limited and lives in Brisbane. The defendant Sir Thomas McIlwraith is a Member of the Legislative Assembly of Queensland. The defendant Sir Arthur Hunter Palmer is the President of the Legislative Council of Queensland. The defendant Frederick Hamilton Scott Hart is a Merchant and a Member of the said Legislative Council of Queensland.

2. Before the times herein mentioned the defendants other than the defendant Samuel Grimley had been appointed by the plaintiffs to act as their agents and managers in Queensland under the name or style of local directors. The said defendants (hereinafter called the defendants the local directors) received an annual remuneration from the plaintiffs for their services and received from time to time instructions from the plaintiffs' directors in London as to the manner of performing their duties and in particular were instructed not to advance moneys by way of loan except upon good and sufficient security after an independent valuation of the proposed security and not to advance any moneys upon properties in which the defendants the local directors were directly or indirectly interested.

3. The Darling Downs and Western Land Company Limited is a Joint Stock Company incorporated and registered in Queensland in the year 1881. The said company was formed mainly for the purpose of taking over certain freehold and pastoral properties with the stock thereon which had heretofore belonged to the firm of Bell and Sons and to the defendant Sir Thomas McIlwraith and others his partners respectively and included the Estate or Station of Jimbour in the district of Darling Downs. And the said company on its formation took over the said properties respectively.

4. The principal shareholders in the said Darling Downs and Western Land Company Limited were the members of the said firm of Bell and Sons and the defendant Sir Thomas McIlwraith and his former partners. And the defendant Sir Thomas McIlwraith was interested therein to the extent of £100,000 or thereabouts and at the times hereinafter mentioned the defendants Edward Robert Drury Sir Thomas McIlwraith and Sir Arthur Hunter Palmer or some or one of them were or was directors or a director of the said Company.

5. The Queensland National Bank Limited is a Joint Stock Company registered and carrying on the business of Bankers in Queensland. During all the times herein-after mentioned the defendant Edward Robert Drury was the general manager thereof and the defendants Sir Arthur Hunter Palmer and Frederick Hamilton Scott Hart were directors thereof and the defendant Sir Thomas McIlwraith was a shareholder thereof.

6. Between the month of October 1882 and the month of April 1888 and before the commencement of this action the said defendants the local directors authorised the making of certain loans from the funds of the plaintiffs to the defendant Samuel Grimley and between the times aforesaid and by the authority aforesaid large sums of money were lent from the funds of the plaintiffs to the defendant Samuel Grimley at interest and upon the terms and conditions set out in certain Bills of Sale and Mortgages made and executed by the said defendant Samuel Grimley whereby the said defendant amongst other things not necessary to be herein stated covenanted with the plaintiffs that he would pay interest on the sums so lent at the rate and times in the said several Bills of Sale and Mortgages mentioned but not necessary to be herein set out and would at the times and under the circumstances therein mentioned repay to the plaintiffs all the said sums together with the interest accruing due thereon and all other sums advanced by plaintiffs to the said defendant or paid for him or otherwise accruing due from the said defendant to the plaintiffs.

7. Full particulars of the money so lent by the plaintiffs to the said defendant Samuel Grimley and of the interest accruing due thereon have from time to time been furnished by the plaintiffs to the said defendant and the correctness of the said accounts has from time to time been admitted by the said defendant and on the 26th day of November 1888 there was due and owing from the said defendant Samuel Grimley to the plaintiffs in respect of the moneys so lent by the plaintiffs to the defendant and the interest thereon the sum of £66,264 8s. 2d. full particulars whereof have been furnished to the said defendant.

8. All things have happened and all times have elapsed necessary to entitle the plaintiffs to be paid the said sum of £66,264 8s. 2d. together with interest thereon from the said 26th day of November 1888 yet the said defendant Samuel Grimley has not paid the same or any part thereof and the same is still due and owing from the said defendant to the plaintiff Company.

9. The defendant Samuel Grimley in the month of October 1882 applied to the other defendants as local directors of the plaintiff Company for an advance or loan of £16,250 for three years at eight per cent. to enable him to purchase 13,000 acres of land situate in the parish of Cumkillenbar near Dalby being at the rate of £1 5s. per acre of the said land. In the said application it was stated that the said Samuel Grimley would have to pay about £1 15s. per acre for the said land including improvements.

10. The defendants the local directors authorised the said advance and thereafter from time to time before the month of December 1884 made advances to the said defendant Samuel Grimley from the plaintiffs' funds to the extent of £15,972 10s. upon the security of 12,778 acres of the said land.

11. On the 13th of August 1885 the defendants the local directors authorised and shortly afterwards made a further advance of £7,768 to the defendant Samuel Grimley. The said further advance was in part made up of a further loan of 5s. per acre upon the security of the said 12,778 acres of land and the remainder thereof was an advance at the rate of £1 10s. per acre upon 3,049 acres of neighbouring lands then also about to be purchased by the said defendant.

12. The said defendant Samuel Grimley had been the accountant to the said firm of Bell and Sons and up to the 25th day of February 1885 the said defendant was the secretary of the said Darling Downs and Western Land Company Limited. The defendant Sir Arthur Hunter Palmer was an executor of the said Sir Joshua Peter Bell.

13. The said lands in respect of which the said Samuel Grimley applied for the advances aforesaid and upon the security whereof the defendants the local directors authorised the same had been before the selection and purchase thereof from the Crown part of the said Estate or Station of Jimbour then the property of the said firm of Bell and Sons and had been acquired as conditional selections under *The Crown Lands Alienation Act of 1876*. And the said Sir Joshua Peter Bell or the said firm had advanced to the persons selecting the same for the purpose of making the necessary improvements thereon sums amounting to about 10s. per acre for which no security was held by him or the said firm. And the said Darling Downs and Western Land Company Limited had since the time of the making of the said last mentioned advances purchased and became the owners of the said Jimbour Estate or Station.

14. The said 12,778 acres and the said 3,049 acres were so situated as not to be capable of being used as one property otherwise than as part of the said Jimbour Estate or Station and the defendants the local directors knew that the said lands were situated as aforesaid and they further knew and it was the fact that the defendant Samuel Grimley was not purchasing the said lands for the purpose of using the same or as an investment for his own benefit but that he had with the consent of the directors of the said Darling Downs and Western Land Company Limited applied for the said advances to enable him to purchase and that he was purchasing the same solely for the purpose of securing to the Estate of the said Sir Joshua Peter Bell or the said firm of Bell and Sons the repayment of all sums advanced to the selectors of the said land and of securing the said lands to the said Darling Downs and Western Land Company Limited if at any time the said Darling Downs and Western Land Company Limited should desire to purchase the same from the said defendant Samuel Grimley at the cost price thereof.

15. The advances made by the defendants the local directors as aforesaid at the rate of £1 10s. per acre were equal to and in some cases greater than the total amount paid by the defendant Samuel Grimley to the several vendors of the said land as the purchase money thereof as the said defendants well knew and were made by the other defendants to enable him to make such payments.

16. The said lands have never been used by the defendant Samuel Grimley but have ever since the purchase by him been used by the said Darling Downs and Western Land Company Limited as part of the said Estate or Station of Jimbour and the said company has erected fences so as to enclose part of the said lands for their convenience with other parts of the said estate but the said company have never paid any rent for the said lands except for a portion thereof for and in the year 1885 and then at the rate of 6d. per acre per annum only.

17. The said advances were not nor were either of them made *bona fide* for the benefit of the plaintiff Company but were made in the interest and for the benefit of the estate of Sir Joshua Peter Bell or the said firm of Bell and Sons and for the benefit of the Darling Downs and Western Land Company Limited.

18. The said lands situated as they were and are were and are a grossly insufficient security for the said advances or either of them as the defendants the local directors knew or ought to have known and with the exercise of reasonable care would have known. But the said defendants did not exercise reasonable care in making

the said advances or either of them and did not procure any valuation to be made of the said lands but with full knowledge of all the facts aforesaid and without any enquiry as to the real value of the said lands lent the plaintiffs money on the security thereof without obtaining any security for the said money from the persons for whose benefit the said lands were to be purchased with plaintiffs' said money.

19. The defendants the local directors on the 25th day of January 1883 authorised a loan to defendant Samuel Grimley from the funds of the plaintiffs of £7,000 at £9 per centum per annum and the said sum was so advanced to the said Samuel Grimley on the security of a mortgage of 3,144 acres of land situate in the Bunya Mountains near Dalby and certain saw mill plant £4,500 of the said sum of £7,000 was shortly afterwards advanced on the security of the said land and the balance of the said £7,000 as the said mill was erected.

20. The defendants the local directors informed the plaintiffs' London Board that they the said local directors had authorised the said loan of £7,000 and that the said land was valued at £2 per acre. But the said defendants did not inform the said London Board according to the fact and as they well knew that the said value was a value put upon the said land by the defendant Samuel Grimley and that they had not themselves procured a valuation to be made of the said land and that the same had then recently been purchased by him for a less sum or that the said Samuel Grimley was a man of small means and with no experience in the business of saw mill proprietor and that the said Samuel Grimley was secretary to the Darling Downs and Western Land Company Limited.

21. On or about the 30th day of August 1883 a further advance or loan of £2,200 at £10 per centum per annum was granted out of plaintiffs' funds by the defendants the local directors to the defendant Samuel Grimley without any further security than the said hereinbefore mentioned land and mill plant.

22. At and before the time of the making of the said two last mentioned advances the said defendant Samuel Grimley was largely indebted to the said Queensland National Bank and required a large part of the said advances in order that he might apply the same and with the intention of applying the same in payment or part payment of his said indebtedness as the defendants the local directors well knew and the said defendant Samuel Grimley accordingly and with the knowledge and approbation of the said defendants the local directors so applied £7,083 18s. 8d. part of the said advances.

23. The defendants the local directors in the month of October 1883 granted to the defendant Samuel Grimley out of the funds of the plaintiffs a further loan of £5,500 for the purpose of paying for 3,626 acres of land adjoining the property then used by him as a mill as in paragraph 19 hereof mentioned. The said loan was made upon the security of the said 3,626 acres.

24. The defendants the local directors did not exercise reasonable care in the making of the said three last mentioned advances and did not verify the statements made by the defendant Samuel Grimley as to the value of the lands to be given as security and did not grant the said loans or any of them for the benefit of the plaintiff Company but partly for the benefit of the said Queensland National Bank Limited to whom the said Samuel Grimley was then largely indebted.

25. The securities given by the said Samuel Grimley to the plaintiffs in respect of the said loans of £7,000 £2,200 and £5,500 were and are grossly insufficient as the defendants the local directors knew or ought to have known and would have discovered had they taken reasonable care.

26. The defendants the local directors on the 22nd June

1885 authorised and made a further advance from and out of the moneys of plaintiffs to the defendant Samuel Grimley of £4,340 10s. 8d. without any further security for the repayment thereof other than the land machinery and plant heretofore and then held by and as security for the three sums lastly hereinbefore mentioned.

27. The said advance of £4,340 10s. 8d. was so authorised and made out of the funds of the plaintiffs by the said local directors carelessly and negligently and with the full knowledge that the said defendant Samuel Grimley was in default in respect of all previous advances made by the plaintiffs to him and had paid no interest whatever in respect of the sums of £7,000 £2,200 and £5,500 previously advanced to him on the security in respect of which the said further advance was authorised.

28. The said advance and loan of £4,340 10s. 8d. made by defendants the local directors was not made *bona fide* for the benefit of the plaintiffs but was made to enable the defendant Samuel Grimley to pay the same to the said Queensland National Bank Limited and he forthwith with the knowledge and approbation of the said defendants paid the same to the said bank accordingly.

29. The defendants the local directors at the time of making the said advance of £4,340 10s. 8d. knew that the defendant the said Samuel Grimley was largely indebted to other persons than the plaintiffs and knew or with the exercise of reasonable care might have known that the security given to plaintiffs was wholly insufficient to secure the repayment of the money then already advanced thereon exclusive of the said £4,340 10s. 8d. or any part thereof.

30. On the twelfth day of February 1886 the defendants the local directors advanced and lent out of the funds of the plaintiffs to the defendant Samuel Grimley a further sum of £1,000.

31. The said sum of £1,000 was not advanced *bona fide* for the benefit of the plaintiffs but for the benefit of the said Queensland National Bank Limited and in order that it might be paid by the defendant Samuel Grimley to the said bank in part discharge of a debt due by him to the said bank and it was in fact so paid with the knowledge and approbation of the said defendants and the said defendants the local directors did not exercise reasonable care in advancing the said sum and knew or ought to and with exercise of reasonable care could and would have known that the security upon which the said sum was advanced was grossly insufficient and that at the time of the said advance the said Samuel Grimley was unable to meet his engagements and pay his debts as they became due.

32. In the month of January 1887 the defendants the local directors authorised and granted a further loan of £3,000 to the defendant Samuel Grimley for the alleged purpose of enabling the said defendant to pay off all liabilities then due by him and not fully secured other than his liability to the plaintiffs in respect of the various sums of money hereinbefore mentioned and interest thereon and upon the condition that the said defendant Samuel Grimley should execute in favor of the plaintiffs as security therefor a second mortgage of certain land of the said defendant situate in South Brisbane and then subject to a mortgage for £4,000 to the defendant Sir Arthur Hunter Palmer as trustee of a certain estate not necessary to be herein named.

33. The defendants the local directors in the month of January 1887 advanced the said sum of £3,000 to the defendant Samuel Grimley but did not obtain the second mortgage for £3,000 over the said property in the preceding paragraph hereof mentioned but obtained one for £1,000 and further advances.

34. The defendants the local directors at the time they made the said advance of £3,000 knew that the said sum was insufficient to satisfy and pay the liabilities of the

said defendant Samuel Grimley to persons other than the plaintiffs and not fully secured and knew that notwithstanding the said advance the said defendant would still continue indebted to the Queensland National Bank Limited in a large sum besides liabilities to a large amount to other persons.

35. The defendants the local directors were guilty of gross negligence in and about the making of the said advance and did not use reasonable care to protect the plaintiffs from loss in and about the making of the said advance and did not in the making thereof consider the interest of the plaintiffs.

36. On the 14th day of December 1887 the defendants the local directors consented to the release of the said mortgage for £1,000 and further advances in paragraph 33 hereof mentioned on the payment of £1,000 and released the same in order to enable the said defendant to execute a second mortgage over the said land in favour of the defendant Sir Arthur Hunter Palmer and another person his co-trustee of the estate aforesaid to secure £2,000 then lent to the said defendant and upon an undertaking by the said defendant to execute a third mortgage of the said land in favour of the plaintiffs.

37. The said release was not made by the said defendants in the interest of the plaintiffs but to enable the said defendant Samuel Grimley to raise the said sum of £2,000 on the security of the said land £1,000 of which only was to go and did go to the plaintiffs in consideration of the said release.

38. The said release was made by the said defendants negligently and without reasonable care and by reason thereof the plaintiffs were deprived of a valuable security of the value of £4,000 and upwards and have lost the benefit which they would have derived from retaining the said security.

39. The said defendants never obtained the said third mortgage over the said South Brisbane property from the said Samuel Grimley and the said defendant Samuel Grimley has since sold the equity of redemption therein for £2,000 which he received and applied for his own benefit.

40. In the month of March 1888 the defendants the local directors made a further advance of £1,000 to the defendant Samuel Grimley without receiving any further security.

41. The said last-mentioned advance was made by the defendants the local directors carelessly and negligently and without reasonable care and the said defendants knew or ought to have known and if they had used reasonable care would have known that the only effect of the said advance was to increase by that sum and the interest thereon the amount of plaintiffs' loss in respect of the dealings with and advances made by them to the defendant Samuel Grimley.

42. Except the sum of £1,000 in paragraph 37 hereof mentioned no part of the sums advanced by the plaintiffs to the defendant Samuel Grimley has been repaid to plaintiffs and except some small payments made during the years of 1884 and 1885 in part payment of the interest then due on the loans in paragraphs 9 and 10 hereof mentioned no interest has been paid to the plaintiffs in respect of the sums or any of the sums advanced and lent to defendant Samuel Grimley as hereinbefore mentioned and the sum of £66,264 8s. 2d. which is the sum in paragraphs 6 7 and 8 of this claim mentioned is now due and owing from the said defendant Samuel Grimley in respect of the money so advanced to him and interest thereon.

43. The said securities have always been grossly insufficient and inadequate to secure the advances made upon them as aforesaid.

THE PLAINTIFFS' CLAIM.

1. As against the defendant Samuel Grimley £66,264 8s. 2d.
2. Interest on £47,653 4s. 1d. part of the said sum from the 26th day of November 1888 to judgment.
3. As against the other defendants a declaration that they and each of them are personally liable to make good and pay to the plaintiffs such part of the said sum of £66,264 8s. 2d. as may not be paid to them by the defendant Samuel Grimley and as cannot be obtained by the realisation and sale of the securities given therefor.
4. In the alternative £66,264 8s. 2d. for the defendants' neglect of duty as local directors of the plaintiff company and for breach of duty as such directors in and about the making of the advances in the claim mentioned.
5. Such further and other relief as the nature of the case may require.

AMENDED STATEMENT OF DEFENCE OF THE ABOVE-NAMED DEFENDANT SAMUEL GRIMLEY.

Dated the 5th day of June, 1890.

1. This defendant admits that between the month of October 1882 and the month of April 1888 certain sums of money were lent to him from the funds of the plaintiffs upon the terms and conditions set out in certain bills of sale and mortgages made and executed by this defendant but he denies that full or any particulars of the money or any of the money so lent or of the interest accruing due thereon have from time to time or at all been furnished by the plaintiffs to him or that the correctness of the said alleged accounts or any of them has from time to time or at all been admitted by him or that on the 26th day of November 1888 or at any other time there was due or owing from him to the plaintiffs in respect of the moneys so lent or the interest thereon or otherwise the sum of £66,264 8s. 2d. or any other sum or that full or any particulars thereof have been furnished to him.

2. This defendant denies that the plaintiffs are entitled to be paid the said sum of £66,264 8s. 2d. or any other sum together with interest thereon from the said 26th day of November 1888 or any other date as in the eighth paragraph of the Statement of Claim alleged or at all or that this defendant has not paid the same or any part thereof or that the same or any part thereof is still due or owing from him to the plaintiffs.

3. This defendant admits that before the month of December 1884 advances were from time to time made to him from the plaintiffs' funds, to the extent of £15,972 10s. upon the security of the 12,778 acres of land in the tenth paragraph of the Statement of Claim mentioned and that shortly after the 13th day of August 1885 a further advance of £7,768 was made to him by the plaintiffs upon the security of the said 12,778 acres and also of the 3,049 acres of neighbouring land in the eleventh paragraph of the Statement of Claim mentioned.

4. This defendant admits that on or about the 30th day of August 1883 advances to the amount of £9,200 being the advances of £7,000 and £2,200 in the nineteenth and twenty-first paragraphs of the Statement of Claim mentioned were made to him by the plaintiffs upon the security of the 3,144 acres of land and saw mill plant in the nineteenth paragraph of the Statement of Claim mentioned.

5. This defendant admits that in or about the month of October 1883 a further advance of £5,500 was made to him out of the funds of the plaintiffs upon the security of the

3,626 acres of land in the twenty-third paragraph of the Statement of Claim mentioned.

6. This defendant admits that on or about the 22nd day of June 1885 a further advance of £4,340 10s. 8d. was made to him out of the moneys of the plaintiffs upon the security of the land machinery and plant theretofore and then held by the plaintiffs as security for the two sums of £9,200 and £5,500 lastly hereinbefore mentioned but this defendant denies that he was in default in respect of all or any of the previous advances made to him by the plaintiffs or that he had paid no interest whatever or had failed to pay any interest in respect of the sums or either of the sums previously advanced to him on the security in respect of which the said last-mentioned further advance was made to him or otherwise.

7. This defendant admits that on or about the twelfth day of February 1886 a further advance of £1,000 was made to him out of the funds of the plaintiffs.

8. In or about the month of January 1886 it was agreed by and between this defendant and H. S. Littleton acting for and on behalf of the plaintiffs that the rate of interest payable in respect of the various sums of money so lent to this defendant by the plaintiffs as aforesaid should be reduced to seven per cent. per annum.

9. This defendant admits that in or about the month of January 1887 a further advance of £3,000 was made to him by the plaintiffs as to £1,000 part thereof upon the security of the land in the thirty-second paragraph of the Statement of Claim mentioned and that the said sum of £1,000 was repaid by him to the plaintiffs upon the execution of the release in the thirty-sixth paragraph of the Statement of Claim mentioned.

10. This defendant admits that in or about the month of March 1888 a further advance of £1,000 was made to him by the plaintiffs.

11. Save as hereinbefore appearing this defendant does not admit any of the allegations in the Statement of Claim contained and he denies that except as in the forty-second paragraph of the Statement of Claim mentioned no part of the sums advanced by the plaintiffs to him has been repaid or that any part thereof has not been repaid to the plaintiffs or that except as therein alleged no interest has been paid or that any interest has not been paid to the plaintiffs in respect of the sums or any of the sums advanced or lent to him as in the Statement of Claim alleged or otherwise or that the sum of £86,264 8s. 2d. in the Statement of Claim mentioned or any other sum is now due or owing from this defendant in respect of the money so advanced to him and the interest thereon or at all.

12. The plaintiffs have entered into and are still in possession and receipt of the rents and profits of the lands comprised in the several mortgages hereinbefore mentioned and have also taken possession of sold and realized the properties comprised in the several bills of sale hereinbefore mentioned and have never accounted to this defendant for such rents profits and proceeds as aforesaid and this defendant submits that if contrary to what he contends and believes he is still indebted to the plaintiffs in respect of the moneys or any of the moneys so lent to him as aforesaid the plaintiffs are only entitled to recover from him what (if anything) shall be found to be due upon the taking of all proper accounts in respect of the premises.

**AMENDED STATEMENT OF DEFENCE OF THE
ABOVE-NAMED DEFENDANTS EDWARD
ROBERT DRURY SIR THOMAS McILWRAITH
SIR ARTHUR HUNTER PALMER AND FRED-
ERIC HAMILTON SCOTT HART.**

Dated the second day of June, 1890.

1. Prior to the incorporation of the plaintiff company

arrangements had been made by certain persons not necessary to be herein mentioned who were acting as promoters of the plaintiff company that in case the plaintiff company was successfully floated two of the Queensland directors of the Queensland National Bank Limited in the Statement of Claim mentioned (hereinafter called "the said Bank") and also that two of the London directors of the said Bank should join the plaintiff company's board of directors to be established in Queensland and London respectively in order to secure the full co-operation of the said Bank in the undertakings of the plaintiff company and enable the plaintiff company to commence business with a large connection already formed by the said Bank in Queensland and under the experienced management of highly influential Colonial directors.

2. In pursuance of such arrangements as aforesaid by the original Articles of Association of the plaintiff company the defendants Edward Robert Drury Sir Thomas McIlwraith and Frederic Hamilton Scott Hart were duly appointed three of the first directors of the plaintiff company in Queensland and Jacob Levi Montefiore and Archibald Berdmore Buchanan respectively directors of the said Bank in London were duly appointed two of the first directors of the plaintiff company in London.

3. In further pursuance of such arrangements as aforesaid and of certain provisions in that behalf in the said Articles of Association contained by Deed Poll dated the 13th day of August 1878 and duly given under the seal of the plaintiff company certain powers and authorities were conferred upon the defendants Edward Robert Drury Sir Thomas McIlwraith and Frederic Hamilton Scott Hart as such directors as aforesaid and on or about the 17th day of December 1878 the plaintiff company was registered in Queensland under the provisions of *The Foreign Companies Act of 1867*.

4. On or about the 22nd day of January 1881 the defendant Sir Arthur Hunter Palmer was duly appointed a director of the plaintiff company in Queensland and these directors respectively continued to hold their appointments as such directors as aforesaid from the dates of their respective appointments until the month of September 1888 and have since the formation of the plaintiff company during all the times in the Statement of Claim mentioned been large shareholders therein respectively.

5. Save as hereinbefore appearing these defendants deny that they or any of them were ever appointed by the plaintiffs to act as their agents or managers in Queensland or elsewhere under the name or style of local directors or otherwise or that they or any of them from time to time or at all received instructions from the plaintiffs' directors in London as to the manner of performing their duties or in particular were instructed not to advance moneys by way of loan except upon good and sufficient security after an independent valuation of the proposed security or not to advance any moneys upon properties in which they or any of them were directly or indirectly interested.

6. The defendant Sir Thomas McIlwraith was an original director of the Darling Downs and Western Land Company Limited in the third paragraph of the Statement of Claim mentioned (and hereinafter called "the said company") but was not at any time the holder of a greater number than 991 shares therein of £100 each and upon each of which the sum of £65 was credited in the books of the said company as having been paid up. The defendant Sir Arthur Hunter Palmer did not become a director of the said company until the 4th day of January 1882 or thereabouts and retired from that position in or about the month of February 1886 and the defendant Edward Robert Drury did not become a director thereof until the 19th day of February 1886 or thereabouts.

7. Save as hereinbefore appearing these defendants deny that the defendant Sir Thomas McLlwraith was ever interested in the said company to the extent of £100,000 or thereabouts or to any extent whatsoever or that the defendants Edward Robert Drury Sir Thomas McLlwraith or Sir Arthur Palmer or any of them were or was at the times in the Statement of Claim alleged or at all directors or a director thereof.

8. These defendants deny that the making of the loans or any of the loans in the sixth paragraph of the Statement of Claim mentioned was ever authorised by these defendants or that the sums of money therein mentioned or any of them were ever lent from the plaintiffs' funds by the authority of these defendants.

9. Between the month of October 1882 and the month of April 1888 the plaintiffs' board of directors for the time being in Queensland (hereinafter called "the said board") authorised and made certain loans to the above-named defendant Samuel Grimley upon divers securities not necessary to be herein mentioned.

10. These defendants do not admit any of the allegations in the seventh paragraph of the Statement of Claim contained and they deny that the correctness of the alleged accounts has from time to time or ever been admitted by the said Samuel Grimley or that on the 26th day of November 1888 or at any other time there was due or owing from the said Samuel Grimley to the plaintiffs in respect of the moneys so lent and the interest thereon or otherwise the sum of £66,264 8s. 2d. or any other sum.

11. These defendants deny that the plaintiffs are entitled to be paid the said sum of £66,264 8s. 2d. or any other sum together with interest thereon from the said 26th day of November or any other date or that the said Samuel Grimley has not paid the same or any part thereof or that the same or any part thereof is still due or owing from him to the plaintiffs.

12. These defendants deny that in the month of October 1882 or at any other time the said Samuel Grimley applied to these directors or that he applied to any of them as local directors of the plaintiffs or that he at such time or at all applied for any such loan as in the ninth paragraph of the Statement of Claim alleged or that he applied for any loan for any such purpose as therein alleged.

13. In or about the month of October 1882 the said Samuel Grimley applied to the said board for an advance at the rate of £1 5s. an acre upon the security of the lands in the ninth paragraph of the Statement of Claim mentioned in the event of the same being purchased by him and not otherwise.

14. These defendants deny that they or any of them ever authorised any such loan as in the ninth paragraph of the Statement of Claim alleged or that any other advance was ever authorised by these defendants or that the advances in the tenth paragraph of the Statement of Claim mentioned or any of them or any other advances were ever made by these defendants.

15. In pursuance of the said application between the month of September 1883 and the month of December 1884 advances amounting in the whole to a sum of £15,972 10s. were from time to time made by the authority of the said board to the said Samuel Grimley upon the security of certain bills of mortgage over certain of the said lands amounting in the aggregate to 12,778 acres or thereabouts after the same had been purchased by the said Samuel Grimley as aforesaid and also upon the security of all other properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley.

16. These defendants deny that the further advance of 7,768 in the eleventh paragraph of the Statement of Claim mentioned or any other advance was ever authorised

or made by these defendants or that the same was in part made up of a further loan of 5s. per acre upon the security of the said 12,778 acres or that the remainder thereof was an advance at the rate of £1 10s. per acre upon 3,049 acres or any other quantity of the lands in the eleventh paragraph of the Statement of Claim mentioned or of any other lands then about to be purchased by the said Samuel Grimley or otherwise.

17. In or about the month of August 1885 a further advance of £7,768 was authorised and shortly afterwards made by the said board to the said Samuel Grimley upon the security of a bill of mortgage over the 12,778 acres and the said 3,049 acres respectively for securing repayment to the plaintiffs of the said sum of £15,972 10s. hereinbefore mentioned and of the said further advance of £7,768 respectively together with all other moneys due or to become due to the plaintiffs from the said Samuel Grimley as therein mentioned and also upon the security of all other properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley.

18. These defendants admit that the said Samuel Grimley was the secretary of the said company up to the month of February 1885 or thereabouts and that the defendant Sir Arthur Hunter Palmer was an executor of the late Sir Joshua Peter Bell in the Statement of Claim mentioned but save as aforesaid they do not admit any of the allegations in the twelfth paragraph of the Statement of Claim contained.

19. These defendants do not admit any of the allegations in the thirteenth paragraph of the Statement of Claim contained and they deny that any property taken over or purchased by the said company or whereof the said company ever became or are now the owners included or includes the said lands upon the security whereof the said advances hereinbefore mentioned were or any of them was authorised or made to the said Samuel Grimley.

20. These defendants deny that the said 12,778 acres or that the said 3,049 acres were or that any part thereof respectively was so situated as not to be capable of being used as one property otherwise than as part of the Jimbour Estate in the Statement of Claim mentioned or that these defendants or any of them knew that the said lands or any of them were so situated or that they or any of them further or at all knew or that it was the fact that the said Samuel Grimley was not purchasing the said lands or any of them for the purpose of using the same or any of them or as an investment for his own benefit or that he had with the consent of the directors of the said company or any of them or of any other person or persons whatsoever or at all applied for the said advances or any of them to enable him to purchase or that he was purchasing the same or any of them solely or at all for the purpose of securing to the estate of the said Sir Joshua Peter Bell or the firm of Bell and Sons in the Statement of Claim mentioned the repayment of all or any sums alleged to have been advanced to selectors of the said land or of any part thereof or to any such selector or of securing the said lands or any of them to the said company or any other person or persons if at any time they should desire to purchase the same from the said Samuel Grimley at the cost price thereof or otherwise.

21. These defendants deny that the said advances hereinbefore mentioned at the rate of £1 10s. per acre or otherwise were equal to or in some or any cases greater than the total amount paid by the said Samuel Grimley to the several vendors of the said lands as the purchase money thereof or that these defendants or any of them well or at all knew the same or that the said advances or any of them were made by these defendants or by any of them to enable the said Samuel Grimley to make any such payments.

22. The said payments had at all times been made by the said Samuel Grimley to the several vendors of the said lands and the purchase of the said lands completed by him before any advances were made to him by the plaintiffs in respect thereof.

23. These defendants deny that the said lands or that any of them have never been used by the said Samuel Grimley or that they or any of them have ever since the purchase by him or save as hereinafter appearing at all been used by the said company or any other person or persons as part of the said Jimbour Estate or otherwise or that the said company has erected fences so as to enclose part of the said lands for their convenience with other parts of the said estate.

24. In or about the year 1884 in pursuance of an agreement in that behalf made by and between the said Samuel Grimley and the said company the sheep of the said company were for a short period allowed to run upon certain of the said lands in consideration whereof a rental was duly paid to the said Samuel Grimley by the said company.

25. These defendants deny that the said advances or that any of them were not made *bona fide* for the benefit of the plaintiffs or that they or any of them were made in the interest or for the benefit of the estate of the said Sir Joshua Peter Bell or of the said firm of Bell and Sons or of the said company or of any person or persons other than the plaintiffs.

26. These defendants deny that the said lands or that any of them situated as they were or are or otherwise were or are a grossly or at all an insufficient security for the said advances or that these defendants or any of them knew or ought to have known or with the exercise of reasonable or any amount of care could or would have known that they or any of them were so insufficient or that these defendants or any of them did not exercise reasonable or the greatest care in making the said advances or any of them or otherwise or did not procure any valuation to be made of the said lands or any of them or with full or any knowledge of all or any of the facts in the Statement of Claim alleged or without any enquiry as to the real value of the said lands or otherwise lent the plaintiffs money on the security thereof without obtaining any security for the said money from the persons for whose benefit it is alleged the said lands were to be purchased with the plaintiffs' said money or otherwise.

27. These defendants deny that the loan of £7,000 in the nineteenth paragraph of the Statement of Claim mentioned was ever authorised or advanced by these defendants and they deny that £4,500 of the said sum of £7,000 was shortly afterwards advanced on the security of the 3,144 acres of lands in the nineteenth paragraph of the Statement of Claim mentioned or otherwise or that the balance of the said £7,000 was advanced as the mill therein mentioned was erected.

28. On or about the 26th day of January 1883 a loan of £7,000 was authorised by the said board to the said Samuel Grimley upon the security of the said 3,144 acres of land and of the saw mill plant in the nineteenth paragraph of the Statement of Claim mentioned.

29. These defendants do not admit that they informed the plaintiffs' London board that the said land was valued at £2 per acre and they deny that it was the fact or that these defendants or any of them knew that the said value was a value put upon the said land by the said Samuel Grimley only or that they had not themselves valued or procured a valuation to be made of the said last-mentioned land or that the same had been recently or at all purchased by the said Samuel Grimley for a less sum or that the said Samuel Grimley was a man of small means or with no experience in the business of a saw mill proprietor.

30. If (which these defendants deny) the facts or any of

the facts were as in the twentieth paragraph of the Statement of Claim alleged these defendants deny that they did not inform the plaintiffs' London directors thereof so far as the same were material.

31. These defendants deny that the further advance of £2,200 in the twenty-first paragraph of the Statement of Claim mentioned was granted by these defendants or that the same or any part thereof was granted without any further security than the said last-mentioned land and mill plant.

32. On or about the 30th day of August 1883 the said loan of £7,000 so authorised as aforesaid together with the said further advance of £2,200 amounting together to the sum of £9,200 was advanced by the authority of the said board to the said Samuel Grimley upon the security of a bill of mortgage over the said 3,144 acres and of a bill of sale over the said saw mill plant and machinery and other properties therein mentioned and also upon all other securities for the time being held by the plaintiffs in respect of all other moneys due or to become due to them from the said Samuel Grimley.

33. These defendants deny that at or before the time in the twenty-second paragraph of the Statement of Claim alleged or at any other time the said Samuel Grimley was largely indebted to the said bank or required a large or any part of the said advances in order that he might apply the same or with the intention of applying the same in payment or part payment of his alleged indebtedness or that these defendants or any of them well or at all knew the facts or any of the facts in the twenty-second paragraph of the Statement of Claim alleged or that the said Samuel Grimley accordingly or with the knowledge or approbation of these defendants or any of them or at all so applied £7,083 18s. 8d. or any other sum part of the said advances or any of them.

34. These defendants deny that the further loan of £5,500 in the twenty-third paragraph of the Statement of Claim mentioned was granted by these defendants or that the same or any other sum was ever granted to the said Samuel Grimley for the purpose alleged or otherwise of paying for the 3,626 acres therein mentioned or of any other land whatsoever.

35. On or about the 4th day of October 1883 the said board granted to the said Samuel Grimley a further advance of £5,500 upon the security of a bill of mortgage over the said 3,626 acres theretofore purchased by the said Samuel Grimley and also upon the security of all other properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley.

36. These defendants deny that they or any of them did not exercise reasonable or the greatest care in the making of the said three last-mentioned advances or otherwise or that they did not verify the statements made by the said Samuel Grimley as to the value of the said lands to be given as security or that they or any of them did not grant the said loans or any of them for the benefit of the plaintiffs or that they or any of them granted the said loans or any of them partly or at all for the benefit of the said bank or that the said Samuel Grimley was then largely or at all indebted to the said bank.

37. These defendants deny that the securities in the twenty-fifth paragraph of the Statement of Claim mentioned or that any of them were or are grossly or at all insufficient or that these defendants or any of them knew or ought to have known or could or would have discovered such alleged insufficiency had they taken reasonable or any amount of care or otherwise.

38. These defendants deny that the advance of £4,340 10s. 8d. in the twenty-sixth paragraph of the Statement of Claim mentioned was authorised or made by these defendants or that the same was made without any fur-

ther security for the repayment thereof other than the land machinery and plant in the twenty-sixth paragraph of the Statement of Claim mentioned.

39. On or about the 22nd day of June 1885 a further advance of £4,340 10s. 8d. was authorised and made by the said board to the said Samuel Grimley upon the security of the land machinery plant and other property theretofore and then held by the plaintiffs as security for the three sums lastly hereinbefore mentioned and also upon the security of all other properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley.

40. These defendants deny that the said advance of £4,340 10s. 8d. was authorised or made by these defendants or by any of them carelessly or negligently or with full or any knowledge or that it was the fact that the said Samuel Grimley was in default in respect of all or any previous advances made by the plaintiffs to him or that he had paid no interest whatever or had failed to pay any interest in respect of the sums or any of the sums previously advanced to him on the security in respect of which the said further advance was authorised or otherwise.

41. These defendants deny that the said advance of £4,340 10s. 8d. or that any part thereof was not made *bona fide* for the benefit of the plaintiffs or that it was made to enable the said Samuel Grimley to pay the same or any part thereof to the said bank or that he forthwith or at all or with the knowledge or approbation of these defendants or any of them or otherwise paid the same or any part thereof to the said bank accordingly or otherwise.

42. These defendants deny that they or any of them at the time of the making of the said advance of £4,340 10s. 8d. or at all knew or that it was the fact that the said Samuel Grimley was largely or at all indebted to other persons than the plaintiffs or that these defendants or any of them knew or with the exercise of reasonable or any amount of care might have known or that it was the fact that the security given to the plaintiffs was wholly or at all insufficient to secure the repayment of the money then already advanced thereon exclusive of the said £4,340 10s. 8d. or otherwise.

43. These defendants deny that the further sum of £1,000 in the thirtieth paragraph of the Statement of Claim mentioned was advanced or lent by these defendants.

44. On or about the 12th day of February 1886 a further sum of £1,000 was advanced and lent by the said board to the said Samuel Grimley upon the security of a bill of sale over certain bullock teams and other property therein mentioned and of certain promissory notes amounting in the whole to £1,458 4s. and endorsed and delivered by the said Samuel Grimley to the plaintiffs and also upon the security of all other properties for the time being held by the plaintiffs in respect of all other moneys due or to become due to them from the said Samuel Grimley.

45. These defendants deny that the said sum of £1,000 or that any part thereof was not advanced *bona fide* for the benefit of the plaintiffs or that the same or any part thereof was advanced for the benefit of the said bank or in order that it or any part thereof might be paid by the said Samuel Grimley to the said bank in discharge or part discharge of a debt due by him to the said bank or otherwise or that it or any part thereof was in fact so paid with the knowledge or approbation of these defendants or any of them or otherwise or that these defendants or any of them did not exercise reasonable or the greatest care in advancing the said sum or otherwise or knew or ought to have known or that it was the fact that the said security upon which the said sum was advanced was grossly or at all insufficient or that at the time of the said advance the said Samuel Grimley was unable to meet his engagements

or any of his engagements or pay his debts or any of his debts as they became due.

46. These defendants deny that the further loan of £3,000 in the thirty-second paragraph in the Statement of Claim mentioned was authorised or granted by these defendants and they deny that the same or any other sum was ever granted for the purpose alleged or otherwise of enabling the said Samuel Grimley to pay off all or any liabilities then due by him and not fully secured other than his liability to the plaintiffs in respect of the various or any of the sums of money in the Statement of Claim alleged or otherwise or that the same was granted upon the condition that the said Samuel Grimley should execute in favor of the plaintiffs as security therefor a second or any mortgage of the South Brisbane land in the thirty-second paragraph of the Statement of Claim mentioned or any other land whatsoever.

47. These defendants deny that the said sum of £3,000 or any other sum was ever advanced by these defendants.

48. In or about the month of January 1887 a further advance of £3,000 was authorised and made by the said board to the said Samuel Grimley upon the security of the various properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley and as to £1,000 part of the said £3,000 upon the further security of a second mortgage over the said South Brisbane land.

49. These defendants deny that they or any of them at the time the said advance of £3,000 was made or at all knew or that it was the fact that the said sum was insufficient to satisfy or pay the liabilities of the said Samuel Grimley to any persons or person other than the plaintiffs and not fully secured or that they or any of them knew or that it was the fact that notwithstanding the said advance the said Samuel Grimley would still continue indebted to the said bank in a large or any sum besides liabilities to a large or any amount to any other person or persons or otherwise.

50. These defendants deny that they or any of them were guilty of gross or any negligence in or about the making of the said advance or otherwise or that they or any of them did not use reasonable or the greatest care to protect the plaintiffs from loss in or about the making of the said advance or otherwise or did not in the making thereof or otherwise consider the interest of the plaintiffs.

51. These defendants deny that on the 14th day of December 1887 or at any other time they consented to the release of the said last-mentioned mortgage or that they released the same or that the same was released in order to enable the said Samuel Grimley to execute a second or any mortgage over the said South Brisbane land or any part thereof to the defendant Sir Arthur Hunter Palmer or any other person or persons to secure £2,000 or any other sum then or otherwise lent to the said Samuel Grimley or that they or any of them consented to release or released the said mortgage upon an undertaking by the said Samuel Grimley to execute a third or any mortgage of the said South Brisbane land or of any part thereof in favor of the plaintiffs.

52. These defendants say that on or about the 14th day of December 1887 a release of the said last-mentioned mortgage was executed by the authority of the said board upon payment to the plaintiffs of the said sum of £1,000 by the said Samuel Grimley.

53. These defendants deny that the said release was not made in the interest of the plaintiffs or that the same was made to enable the said Samuel Grimley to raise the said sum of £2,000 or any other sum on the security of the said South Brisbane land or otherwise or that £1,000 of the said sum of £2,000 or any other amount was to go or did go to the plaintiffs in consideration of the release.

54. These defendants deny that the said release was

made by the said defendants or by any of them negligently or without reasonable or the greatest care or that by reason thereof or otherwise the plaintiffs were deprived of a valuable or any security of the value of £4,000 and upwards or any other value or that the plaintiffs have lost the benefit which they would have derived or that they would have derived any benefit from retaining the said security or that the plaintiffs have been otherwise damaged howsoever.

55. The defendants admit that they never obtained a third mortgage over the said South Brisbane land but they deny that the said Samuel Grimley has since or at all sold the equity of redemption therein for £2,000 or any other sum or that he received or applied the same or any part thereof for his own benefit.

56. These defendants deny that the advance of £1,000 in the fortieth paragraph of the Statement of Claim mentioned was made by the defendants and say that the same was made by the said board upon the security of the various properties for the time being held by the plaintiffs as security for all other moneys due or to become due to them from the said Samuel Grimley.

57. These defendants deny that the said last-mentioned advance was made by them or by any of them carelessly or negligently or without reasonable or the greatest care or that they or any of them knew or ought to have known or if they had used reasonable or any amount of care or otherwise could or would have known or that it was the fact that the only effect of the said advance was to increase by that sum and the interest thereon or otherwise the amount of the plaintiffs' alleged loss in respect of the dealings with or advances made by them or any of them to the said Samuel Grimley or otherwise.

58. These defendants say that the plaintiffs and their London directors at all times and with full knowledge of all material facts approved of and acquiesced in the actions and dealings of the said board in relation to the advances and each and every of the advances made by the plaintiffs to the said Samuel Grimley and otherwise in relation to the premises.

59. The advances hereinbefore mentioned were and each and every of them was authorised and made by the said board to the said Samuel Grimley in the belief and full confidence that the securities therefor were and that each and every of them was a sound and sufficient security for the moneys respectively advanced thereon and the said advances were and each and every of them was authorised and made by the said board as aforesaid and in all other respects the said board acted in relation to the premises *bona fide* and to the best of their judgment and ability in the exercise of their powers as such directors as aforesaid in the interest and for the benefit of the plaintiffs and not otherwise howsoever.

60. These defendants deny that except as in the forty-second paragraph of the Statement of Claim alleged no part of the sums advanced by the plaintiffs to the said Samuel Grimley has been repaid or that any part thereof has not been repaid to the plaintiffs or that except as therein alleged no interest has been paid or that any interest has not been paid to the plaintiffs in respect of the sums or any of the sums advanced or lent to the said Samuel Grimley as in the Statement of Claim alleged or otherwise or that the sum of £66,264 8s. 2d. in the forty-second paragraph of the Statement of Claim mentioned or any other sum is now due or owing from the said Samuel Grimley in respect of the money so advanced to him and interest thereon or at all.

61. These defendants deny that the said securities or any of them have always been or are now grossly or at all insufficient or inadequate to secure the advances or any of the advances made upon them as in the forty-third paragraph of the Statement of Claim alleged or at all.

Butledge, on behalf of Grimley, offered to consent to judgment against him for an account to be taken of what, if any, amount may be found to be due by him to the plaintiffs, and for judgment for such amount as on the taking of such account may be found to be due.

Lilley refused the offer, and proceeded to state the case to the jury.

All the material facts will be found in the judgment and findings of His Honor The Chief Justice, and also in the judgment of the Full Court, both of which are printed in supplements to be supplied with the April number

On the liability of directors, *Lilley* quoted *Leeds Estate, Building and Investment Co. v. Shepherd*, 36 Ch. D., 787; *In re Faure Electric Accumulator Co.*, 40 Ch. D., 141; *The Sheffield and South Yorkshire Permanent Building Society v. Aislewood*, 44 Ch. D., 412; *Learoyd v. Whiteley*, 12 App. Ca., 727; *Knox v. McKinnon*, 13 App. Ca., 753; *Rae v. Meek*, 14 App. Ca., 558.

Evidence was then led for the plaintiff company, and the case in chief on their behalf closed on Friday, 11th December, 1891.

Rees, on behalf of Grimley: I do not propose to open my case to the jury, or to call any evidence.

Byrnes, S.G., opened on behalf of the defendants other than Grimley, and after *Shand* had tendered some documents on behalf of defendants other than Grimley, the trial was, on the 15th December, 1891, adjourned by consent of parties until the 15th February, 1892.

On the 15th February, 1892, the case was resumed, and evidence called on behalf of the defendants, and case closed on their behalf on Wednesday, 23rd March, 1892.

Lilley called evidence in reply.

Byrnes: Evidence in rebuttal must be strictly in rebuttal. *Rees v. Smith*, 2 Starkey, 30; *Roe v. Day*, 7 C. & P., 705; *Jacobs v. Tarlton*, 11 Q.B., 421.

Power followed.

Lilley: It is admissible. *Roscoe* (last edition), p. 273; *Nicol v. Bower*, 16 Q.B., 805.

Byrnes, S.G., in reply.

LILLEY, C.J.: It is in my discretion, but the evidence is not strictly in rebuttal; it is to value; and I should by admitting it now re-open one branch of the case.

Witness withdrawn and further evidence in reply given.

Lilley then applied for leave to amend the Statement of Claim by certain stated amendments, viz.:—

PROPOSED AMENDMENTS.

13. Insert the word "conditional" in the sixth line of the Statement of Claim after the word "as" and before the word "selections."

13a. The said lands in paragraphs 9 10 and 11 hereof mentioned were not applied for by way of conditional purchase by the persons applying for the same respectively for the *bona fide* use or occupation or benefit of the said applicants or any of them in their or any or either of their own proper persons but as servants or agents of or as trustees for the said Sir Joshua Peter Bell or as servants or agents of or as trustees for the said firm of Bell & Sons.

13b. The said persons so selecting the said lands as aforesaid had entered into agreements express or implied to permit the said Sir Joshua Peter Bell or the said firm of Bell & Sons to acquire the said lands by purchase.

13c. The said persons so selecting the said lands as aforesaid had entered into agreements express or implied to transfer the same to the said Sir Joshua Peter Bell or the said firm of Bell & Sons or to permit the said Sir Joshua Peter Bell or the said firm of Bell & Sons to otherwise acquire the said lands.

13d. After the death of the said Sir Joshua Peter Bell which took place in the month of December 1881 the said several persons selecting the said lands did not use or occupy the same *bona fide* for their or either of their own use or occupation or benefit but as the servants or agents of or as trustees for the said Samuel Grimley or as servants or agents of or as trustees for the said firm of Bell & Sons and each and every of the said persons were in respect of the said lands selected by them the servants or agents of or trustees for the said Samuel Grimley or the servants or agents of or trustees for the said firm of Bell & Sons.

13e. After the death of the said Sir Joshua Peter Bell as aforesaid the said several persons selecting the said lands had entered into agreements express or implied to permit the said Samuel Grimley or the said firm of Bell & Sons to acquire such lands by purchase.

13f. After the death of the said Sir Joshua Peter Bell as aforesaid the said several persons selecting the said lands had entered into agreements express or implied to permit the said Samuel Grimley or the said firm of Bell & Sons to otherwise acquire the said lands.

13g. The said 12,778 acres of land in paragraphs 9 10 and 11 hereof mentioned were at the times in the said paragraphs respectively mentioned comprised in conditional selections under the provisions of the Act aforesaid in respect of which the condition of occupation had not been fulfilled in accordance with the provisions of the said Act and in respect of which no Deeds of Grant for an estate in fee simple had been issued by the Crown.

19a. The said 3,144 acres of land in paragraph 19 hereof mentioned were at the times in the said paragraph mentioned comprised in a conditional selection under the provisions of the Act aforesaid in respect of which the condition of occupation had not been fulfilled in accordance with the provisions of the said Act and in respect of which no Deeds of Grant for an estate in fee simple had been issued by the Crown.

Lilley, in support of application for amendment, referred to *Order XXVII*, r. 1; *Harding, A. & O.*, p. 595; *Tidesley v. Harper*, 10 Ch. D., 393; *Kurtz v. Spence*, 36 Ch. D., 770; *Shickle and others v. Lawrence and another*, 2 Times L.R., 776; *Ecklin v. Little*, 34 Sol. J., 546; *Australian Steam Navigation Company v. Howard Smith & Sons*, 14 App. Ca., 318; *Riding v. Hawkins*, 14 P.D., 56.

Feez for defendant Grimley: Amendments are irrelevant; if the amendments are allowed it should only be on condition that plaintiff company pay all costs to date, and in any event pay the costs of the day. I wish for an adjournment.

Byrnes, S.G., applied for adjournment.

Lilley: I have no objection to the adjournment, but I object to pay any costs.

By request the trial was accordingly adjourned until Monday, 28th March, for consideration and hearing.

Feez on behalf of defendant Grimley: Amendments should not be allowed inasmuch as they are embarrassing. They are not particular, and they are not definite. Amendments also are immaterial and irrelevant. Further, they merely rest on a technical point and cannot be made. If plaintiff company now had another case they should bring it in the proper way; that is: by a separate action. There is only one possible way in which the defendants can be compensated; that is: that all the costs up to date be paid by the plaintiffs, and that such adjournment as may seem necessary to defendants to meet the proposed amendments be granted. I submit the present issues should be settled, and the new issues be made the subject of another action on the several objections raised. *Clarapelle v. The Commercial Union Association*, 32 W.R., 262; *Stewart v. Northern Metropolitan Tramway Company*, 16 Q.B.D., 556; *Attorney-General v. Simpson*, 1 Q.L.J., 19; *Moss v. Malings*, 33 Ch. D., 603; *Wood v. Durham*, 21 Q.B.D., 501; *Lever v. Goodwin*, W.N. (1887), p. 107; *Collette v. Goode*, 7 Ch. D., 847; *Edevan v. Cohen*, 41 Ch. D., 563; *Hipgrave v. Case*, 28 Ch. D., 356, were cited.

Byrnes, S.G., on behalf of defendants other than Grimley: Application is extravagant. Amendments cannot be allowed when they do irretrievable injustice. Here plaintiffs can still bring an action. Amendments have been allowed where the point was a concise one, but here the action is one of fraud; as appears by the writ negligence and malfeasance are charged. And in actions of fraud the Court is chary in making amendments. Pleadings should be framed with exactitude. *Dary v. Garrett*, 7 Ch. D., 489. The Court would be chary in allowing amendments which would make the case different from that which the defendants came into Court to meet. *Simons v. City Bank and others*, 2 Times L.R., 330. There is nothing in the pleadings to show the case brought against us. The charge in the first place was that the securities advanced upon were insufficient; the present charge is that there are no securities whatever. The allegation now is that the lands in question were 'dummied,' but the Crown Grant having issued, and the plaintiff company being registered mortgagees, no question as to the security of the title to these lands can be litigated between the plaintiff company and anybody else except the Crown. If a decision should be given that, because lands had been once dummied they might be resumed no matter what stages they had passed through, it would lead to an unsettlement

of titles that would be absolutely disastrous. LILLEY, C.J.: My judgment would not bind the Crown. As far as I can see there would be no unsettlement of title, but I am not giving any positive opinion on the matter. My intention in making any reservation is to give the utmost opportunity to the defendants to stand right in law and in point of justice.] The application is not made *bona fide*, affecting as it does many of plaintiffs' own titles. If the amendments are granted all the costs should be paid up to date to defendants; that is: the costs since the trial began.

Power followed.

Lilley in reply: I opened the case of dummying from the first. Allegations of dummying are contained in the 14th paragraph of the Statement of Claim. As far as time was concerned, application for the amendments could not have been made earlier. As to their being irrelevant, they go to the very root of the matter and bring up for decision whether the lands advanced upon had no title, or what sort of title they had. There is a similar case which went to the Privy Council, *Tooth v. Power*, 1891, App. Ca. 284.

LILLEY, C.J.: I allow the amendments. Fresh copy of the plaintiffs' amended pleadings to be delivered to the defendants. Leave to defendants to plead, usual time allowed, and plaintiffs to reply within usual time. All questions of costs reserved for the judge. Reserve also question of further adjournment if asked for by defendants in Chambers after the close of the pleadings by joinder of issue, such joinder to be made in due time. After the pleadings, adjourn to a day of which four clear days' notice is to be given to the judge, the opposite party, and the sheriff who is to call the jury.

On the 1st April, 1892, summonses were taken out by the defendant Grimley, and by the defendants other than Grimley, to have the paragraphs 13a, 13b, 13c, 13d, 13e, 13f, 13g, and 19a in the Re-amended Statement of Claim in this action struck out as tending to prejudice and embarrass, and as tending to delay the fair trial of this action. This summons was heard by His Honor The Chief Justice in Chambers on the 4th day of April, 1892.

Lilley, Woolcock with him, for the plaintiff company.

Feez, for defendant Grimley

Power, for the defendants other than Grimley.

Lilley: I have a preliminary objection to take to your Honor hearing this summons on the ground that the subject matter is *res judicata*, and has been decided in Court. Defendants cannot appeal from your Honor in Court to your Honor in Chambers. If they wish to appeal they must go to the Full Court at the conclusion of the case.

Feez: The objection which has been raised was

argued by me and by counsel for the other defendants, but I was not under the impression that the question of the pleadings being embarrassing had been decided, because leave has been given to the defendants to plead, which I submit includes an application of this nature. The plaintiffs allege that the selectors were either the agents, servants, or trustees for the Bells, or Sir Joshua Peter Bell, or Bell & Sons; or that they were the servants of Grimley, or the firm of Bell & Sons. The defendants want to know what the plaintiffs particularly allege. If it is decided that the pleadings are not embarrassing, of course the defendants have no right here; we cannot appeal from your Honor to your Honor.

LILLEY, C.J.: That is a new point. The judge who has the hearing of the case has the whole thing in his hands. So far as this is concerned I do not think the preliminary objection stands in the way. The difficulty would be whether you could go to the Full Court during the trial. I do not think you could. If you have the right to go to the Full Court and object to any or every order made by the judge in the course of the trial there would be no end to the proceedings. If the plaintiffs were richer than the defendants they could exhaust the defendants, or *vice versa*, and the case would never get to the jury. There is no disguising the fact that the costs allowed by the judge do not always compensate the party for all the expense he has been put to. It is certain a rich man could exhaust a poor man in litigation if he could appeal from any order made by a judge in the trial. The only question is whether by suggestion or rehearing I could not put you in a safe position. I think you should be allowed to bring this matter to a final hearing. I would suggest that the pleadings be split into three paragraphs, but I cannot stop the plaintiffs from including the three in one paragraph. I will suggest that if Mr. Feez assures me that he feels embarrassed. How will it embarrass the fair trial of the case? No doubt I decided the relevancy of the amendments at the hearing. I do not think the defendants will be prejudiced. I wish it to be distinctly understood that I express no opinion at all. I do not allow the amendments to be made in any form which will prejudice the other side. No expression from me must be construed into an opinion, and I hope it will not be.

Feez: What Mr. Lilley says is the strongest argument against the amendments being allowed to stand in the form that they were in at present. He says he intends to rely on the evidence given in the trial.

LILLEY, C.J.: I would not bind either side to that. The defendants must be allowed to fight these amendments with ample discretion with reasonable legal evidence. I am not going to tie

the defendants down. I allowed the amendments because I thought it was my duty to do so, and I wish to see the defendants in a fair position to meet them, and to compensate them for any loss they may have sustained by the amendments not being put on the record earlier.

Power: Paragraph 13b is most vague and embarrassing. If Mr. Lilley relied upon a written agreement that should be stated. The paragraph alleged that a certain agreement, express or implied, existed between Sir Joshua Peter Bell, or Bell & Sons, or other parties to which the defendants were strangers. How then could they meet the allegation? A note should be given of the agreement, where it was entered into, and in what year.

Lilley: That is immaterial to me. All that is necessary for me is to show that the agreement was made, and that the defendants knew of it before they made an advance.

Power: Suppose an agreement in writing is set out and the defendants prove it is a forgery? They might have to go to England to prove it. [LILLEY, C.J.: I will give you leave to do anything that I think just in the way of getting evidence. That must be distinctly understood. It has always been my practice to get all the information and evidence I can in every case, and I make no exception in favour of anyone.] That would involve continued adjournments. [LILLEY, C.J.: No. Here you must remember the position of the plaintiffs. The plaintiffs are dealing with persons who were then agents, or whatever they call them, and the information respecting them is peculiar, and may not be addressed to the witnesses themselves. The plaintiffs' counsel says that he has got something out, and he now wishes to make a clearer allegation. Upon that I say, "You may make that allegation, but you must make it as clear as you can. It must not be such as to embarrass, or injure, or prejudice the defendants; but when that allegation has been sufficiently made I will give leave to get further evidence." There was a commission at home, and that got further evidence, and now, if a new commission is granted, I am prepared to give both parties leave to send the amendments home. Nothing fairer can be done. I do not think the date of the agreement, if it were made at any time, would be material. The real question is whether you are likely to be embarrassed in your defence. It does not matter in which of these characters—of servants, trustees, or agents—the persons taking up these lands are described. The material matter is whether they were engaged as alleged. If the defendants will be embarrassed in putting in proof, of course the amendments ought to be altered.]

Lilley: The time is utterly immaterial so long as it was before the time of the actual advance on

the title. [LILLEY, C.J.: I think that is enough. I cannot see that the defendants are embarrassed at all. It would not have embarrassed me in pleading. I do not think, looking at the matter at present, that the defendants would be embarrassed; and, therefore, I cannot say that I ought to strike out anything. The whole of these amendments are open to an ultimate appeal after the trial. Therefore I can make no special order.]

After argument on costs,

LILLEY, C.J.: Dismiss the application with costs against the defendants other than Grimley. I allow no costs against the defendant Grimley.

The hearing was resumed on Monday, 9th May, 1892, and evidence called on the amendments, and the case in reply closed.

Power addressed the jury and quoted *Turquand v. Marshall*, 4 Ch., App. 376; *In re Forest of Dean Coal Mining Co.*, 10 Ch.D., 450; *Overend, Gurney & Co. v. Gibb*, L.R. 5, H.L. 484.

Lilley followed, and quoted *Ashbury v. Watts*, 30 Ch.D., 377; *De Bussche v. Alt*, 8 Ch.D., 287; *Directors of Central Railway Co. of Venezuela v. Kisch*, L.R. 2, H.L. 99; *Bennett v. Colley*, 2 M. & K., 225; *Life Association of Scotland v. Siddall*, 3 De G., F. & J. 58.

LILLEY, C.J., then handed a copy of the following reservations to counsel:—

RESERVATIONS BEFORE SUMMING UP.

1. At the beginning of the trial of issues of fact I intimated to the leading counsel for the plaintiffs and defendants respectively that I was sitting to take the evidence as the Judge dealing with the whole cause as well as Judge with a jury on questions of fact so that in any event there would be no rehearing of the evidence or new trial in the Court of first instance below.

2. The following questions of fact are submitted to the jury—the whole of the issues of law and fact being merely reserved for the Judge at the further and final hearing of the cause and for the Full Court and Courts of Appeal (if necessary) I reserve also all questions of the admissibility or rejection of evidence (if necessary) for the Judge on the final hearing below and all powers of amendments to adopt the final judgment to the case actually proved so that the very right may be done.

The following was added at the request of Byrnes, S.G., and by consent of His Honour The Chief Justice:—

On the first reservation I wish to point out—

1. The intimation with regard to this reservation was made not at the beginning of the trial of the issues but some five days afterward as well as I remember.

2. The intimation was made to the leading counsel for the plaintiffs and the defendants other than Grimley only.

3. These counsel were called up to the Bench and the intimation made to them privately by the Judge. I always treated the intimation as a private communication and in fact I never mentioned it to the counsel engaged in the cause until the Judge handed the reservations some considerable time afterward to the various counsel. I told the Judge at the time that I would communicate the matter to nobody but Mr. Graham Hart of Messieurs Hart and Flower Solicitors for the defendants. I did not communicate it to anybody else and Mr. Hart informs me

he mentioned it to nobody regarding the matter as strictly private.

4. The intimation was that in view of the probable duration of the trial and the consequent labour to judge and the counsel concerned the Judge was reluctant to have to try the case over again in any event and in case the jury disagreed or one of them died his idea was to find the facts himself. To this course I objected at the time.

LILLEY, C.J., then summed up to the jury, who retired on Thursday, 19th May, 1892, and returned on Saturday evening, the 21st May, 1892, when they intimated that they had agreed as far as they were likely to. LILLEY, C.J., read out the answers, again made the reservations before mentioned, and adjourned the further hearing of the cause and motion for judgment until the end of the Civil Sittings then approaching. The issues left to the jury, with the answers thereto by the jury, will be found in the supplement supplied herewith.

The further hearing came on before LILLEY, C.J., alone, on Monday, 18th July, 1892.

Lilley: I move for judgment for the plaintiffs.

The facts show clearly that these loans were made to Mr. Grimley for Bell and Sons. That is shown by the following facts.

Byrnes, S.G.: If your Honour pleases, at this period I object to my friend pursuing this course. He is really going behind the findings of the jury on the motion for judgment. The usual course is to take the findings of the jury and either side moves for judgment on them. [LILLEY, C.J.: I am going to hear the whole of the case. I do not know about the demurrer, but I am going to hear the whole case and consider the findings of jury at the same time. There will be two divisions of the case. First, the hearing of the whole case as Judge; and second, the consideration of the findings of the jury. Then if the demurrers are to be argued I shall consider both the law and the facts on them as well. That is the course I propose to take.] Your Honour has reserved leave to me to argue this question particularly. I understand my friend is going to ask your Honour to reverse the findings of the jury. [LILLEY, C.J.: I have reserved leave to you to argue everything. The whole of the case is open here to both parties for argument upon every point that arose during the trial. That is the course I propose to take. It is of course open to question by the courts above.] Probably now would be the most convenient time before my friend goes into the whole matter. [LILLEY, C.J.: It might be that he has no right to go into the whole question.] The question arises as to whether your Honour can do it and whether your Honour should do it. [LILLEY, C.J.: Whether I should do it is a matter for serious consideration afterwards, but whether I can do it is a matter for argument. It is now only a question what is a convenient time.]

Lilley: I am prepared to argue it now. So far I have the reservations. After I have gone shortly through the case I intend to ask your Honour to reverse some of the findings. I submit that in any case on part of the findings I am entitled to judgment.

Byrnes, S.G.: My friend is in possession of the court. The ordinary course is to move on the findings, but my friend is asking the Judge to go behind the findings. I submit he should show some foundation for an application of that sort. I am prepared to start if necessary. [LILLEY, C.J.: I do not care who begins, but if it is necessary for me to say who shall begin I shall have to decide. As the plaintiff ordinarily claims judgment on the whole case he should begin. I am acting upon my reservations, and I do not mean to reverse them unless, of course, I see very good reasons for doing so. I am acting upon the line I have followed right through the case. I am going to hear the whole of the case. Ordinarily the plaintiff begins. He claims judgment on the whole case, and I give him leave to go into the whole case and findings, and I will allow the defendants to do the same. I will hear the whole of the case in any division you like on the facts and on the law. I will hear you twice over—on the law as applied to the facts, and on the law as a dry abstract question. I do not know that I can intimate more clearly the course I intend to allow you to take. After I have heard everything I will reserve my judgment and very probably put it in writing.]

Lilley: I am arguing at present with the reservations in view, taking for granted that your Honour had power to make those reservations, and that your Honour, if you see fit to do so, will act upon them. If your Honour acts upon them the plaintiffs are entitled to judgment on the whole case, and if your Honour does not act upon them they are entitled to judgment on part of the case.

Byrnes, S.G.: We are not going to argue the question of facts at all. [LILLEY, C.J.: That is a matter for you. I am not going to direct or bother myself. You will take the course which you think best. I give both sides opportunity to be heard fully. That must be understood. Of course, I have heard you both on the facts before.]

Lilley: I submit that your Honour will act on the reservations, and if your Honour thinks proper, having regard to the whole of the evidence, will review the findings of the jury. Power was given to do that by sections 7 and 15 of the Judicature Act, and by order 39, rule 2. *Armstrong v. Armstrong*, 3 M. and K., 45, 62, 68; *Morrison v. Barrow*, 1 De G., F. & J., p. 633; *Brown v. McClintock*, L.R. 6, H.L., p. 456; *Simpson v. Hollander*, L.R. 1, H.L., p. 315; *O'Connor v. Malone*, 6 C. and F., 572; *Fulton v. Andrew* L.R. 7, H.L., p. 449; *Macrae v. Holdsworth*, 1

W.R., p. 489. As the agreement for the advances was made during the period that the selections were conditional selections, and before the certificate of fulfilment of conditions had been issued, that agreement under the 21st section of the Crown Lands Alienation Act of 1876 was illegal. Any security given in pursuance of it was also illegal and void, and for that reason the defendants were liable. *Barton v. Muir*, L.R. 6, P.C., p. 134; and *Tooth v. Power*, L.R., 1891, App. Ca., p. 284. These selections at the time that the agreements for the loan were entered into, on the 2nd November, were conditional selections, and the certificate of fulfilment of conditions had not been issued for one of them, and the selectors were conditionally occupying them. That agreement was therefore made and entered into during the conditional occupation, and was consequently an illegal transaction. *Graeme v. Wroughton*, 24 L.J., N.S., Exch. 265; *Clay v. Ray*, 17 C.B., N.S., p. 188; *Cannan v. Bryce*, 3 B. and Ald., p. 179; *Shaw v. Benson*, 11 Q.B.D., 573; *Howat v. Herrick*, 7 Vic. L.R.L., p. 79; *Chambers v. Chambers*, 2 Vic. L.R., Eq., 179; *Commercial Bank v. Carson*, 6 Vic. L.R., Law, p. 310; *Plant v. Johnson*, 7 Vic. L.R., Law, p. 457. With regard to the South Brisbane transaction, on defendants' own evidence it cannot stand. It was simply a donation to the other creditors at the expense of the company. If there was no power to review the finding of the jury in regard to that the matter would have to be retried. No court would hold that in making an advance of that sort the defendants exercised reasonable care. On the authority of *In re Faure Electric Company*, 40 Ch. Div., p. 141, it was not necessary to show that they were guilty of gross carelessness in order to make them liable. The jury have not found acquiescence on the part of the London board. Acquiescence could only be established where there was full knowledge. *Vivian v. Vivian*, 30 Beav., p. 65. And as the London board had not full knowledge of many material facts they could not be held to have acquiesced. I submit I am entitled to the following relief:—As against Grimley: That an account should be taken of all sums advanced to him from 2nd November, 1882, and interest thereon from the respective dates of the advances at the rates mentioned in respect of the security up to the judgment; that an account should be taken of all moneys paid by defendant Grimley to the plaintiffs and of all moneys received by the plaintiffs for or on his account; and that Grimley might be ordered to pay the balance found due on taking this account and the costs in the action. Against the defendants other than Grimley: If the findings of the jury should not be followed, and the questions that were unanswered should be answered in plaintiffs' favour, judgment against all

the defendants other than Grimley in accordance with the relief claimed. Then if his Honour answered questions 11A to 11H in favour of the plaintiffs, and refused to follow 11F and 11G, judgment against all the defendants as follows:—The relief as claimed in the statement of claim in respect of the following advances: The £15,972 10s. and interest, that was the first advance on the 12,778 acres; £3194 10s. and interest, the second advance of 5s. on the 12,778 acres; and possibly (there being some doubt about it) the £4573 10s. and interest, the advance of £1 10s. an acre on the 3049 acres. The latter was on freehold land, but was connected with the illegal transactions, and was part and parcel of those transactions. On the answers as they stand at present I am entitled to the same relief against all the defendants except Mr. Hart on the selection account. On the mill loans (on the answers as they stood) I submit I am entitled to judgment against all the defendants except Mr. Hart in respect of the £7000 advance and interest and the £2200 advance. Those were the first two mill advances which were made or agreed to be made before the mill lands were made freehold. I submit that as to the further sums there is some doubt because they were made after the mill lands were freehold, and they stand in the same position as the advance of £4573 10s. on the 3049 acres. These were the £5500, £4340 10s. 8d., £2000 unpaid on the South Brisbane transaction, and the last £1000 advance. With respect to the costs against the defendants other than Grimley I submit that is a matter for further consideration.

Woolcock followed, and cited *Byrne v. O'Callaghan*, 9 A.L.T., 126; 13 V.L.R. (L.), 924; *In re Morgan*, 2 Ch. D., 72.

Feez, for the defendant Grimley: The defendant is entitled to judgment. If the argument of my friend is good there must be judgment for Grimley. If the mortgages on which the plaintiffs are suing are illegal and void there can be no doubt whatever that no action can be brought against him upon them. These securities must be either good or bad. If the securities were held to be good, the defendants would be entitled to judgment, and Grimley would have to have judgment given against him in some shape or form. If they were held to be bad the covenant to repay would be illegal, and could not be enforced, and the company could not recover one penny against Grimley; but if your Honour holds that the argument is not good, the judgment against him should be the same as he offered to submit to before the trial, and just after it had begun—that was judgment for an account. [LILLEY, C.J.: In any event it will be that.] Plaintiffs should pay the whole of Grimley's costs of the action. As to costs: Order 54, rule 1. of the Judicature Act. *Harris v. Petherick*, 4

Q.B.D., p. 611; *Myers v. Financial News*, 5 T.L. Reports, p. 42; *Rooke v. Ozarnikow*, 4 T.L. Reports, p. 669; and the cases referred to in the Annual Practice (1892), p. 986.

Byrnes, S.G.: I also move for judgment for the defendants—that is the defendants other than Grimley—with costs, on the findings of the jury, which one and all are in favour of defendants. Now, by the omission of the plaintiffs to ask the Judge to direct the jury to answer questions in a certain way on the ground that the evidence was all one way, how can they be heard before the court to say that the court must on the evidence find diametrically opposite to the jury? Here they asked the Judge who presided at the trial practically to take on himself the functions of the jury, the functions of the Court of Appeal, and functions even higher than the Court of Appeal, because as they had known the law to be laid down in Queensland by the Court of Appeal over and over again, the Court of Appeal would not interfere with the finding of the jury on the ground merely that the weight of the evidence was against the finding. Mr. Woolcock's contention went to show that a particular finding was against the weight of evidence. Even in the Court of Appeal, whatever nominal right the court might have to interfere on that ground, the Court of Appeal did not interfere on that ground. On this particular point—the importance the court attached to the finding of the jury—there is a case of your Honour's: *Gilchrist, Watt and Co. v. Elliott*, 3 Q.L.J., p. 93. [LILLEY, C.J.: There is a matter I may mention, if it is convenient, because it concerns yourself. What is to be done with the demurrer?] It was arranged that the argument on the demurrer should come on with the motion for judgment. [LILLEY, C.J.: If I decide on the demurrer I do not sit in the Court of Appeal, but if I sit only on the law and the facts, it may be competent for me to sit on the demurrer in the Court of Appeal afterwards—that is what I want to avoid.] The first case that was brought into court was that the defendants had dishonestly lent on securities that were of insufficient intrinsic value. Now if that part of the case had been abandoned, perhaps a different set of circumstances might arise; but that part of the case had not been abandoned, because up to the last moment they persisted in asking for judgment against the defendant Grimley for covenants contained in these mortgages and bills of sale, of course recognising them as legal for the purpose. But the other part of the case having been persisted in, and the jury having found in favour of defendants on that part of the case, I submit that the Court of Appeal would give judgment on that part of the case which had been left to the jury and found by them, until this other matter which had come in incidentally had been

finally dealt with. If this course would be followed by the Court of Appeal the Judge of the first instance will not accede to the request of the plaintiffs and answer the questions himself. I submit shortly that no person except the Crown, even assuming that the Crown could do it, can litigate the validity of a Crown grant, or of any title derivative therefrom, on the ground of their illegality. That can not be done in the absence of the Crown. The Crown is not represented here, and no application has been made by plaintiffs that the Crown should be added as a party to the action. That fact alone, coupled with the extraordinary and anomalous position taken up by a mortgagee pretending that he was anxious to invalidate his own securities, show that they have no *bond fide* desire to have this question litigated at all. *Cumming v. Forrester*, 2 J. and W., p. 334. The only ground that can be taken up is that the Crown was deceived in its issue of the grant. If the Crown was not deceived the grant was good against the Crown and everyone else. If the plaintiffs had desired to make the Crown a party they could have applied to have the Attorney-General made a party; but this litigation had gone on, and the Attorney-General had not been made a party. It is too late now to make him a party, unless the case be tried *de novo*. *The United States v. Throgmorton*, 98 U.S. Reports, Otto, vol. 8, p. 61. The pleadings are defective, because they in no way allege that the Government was deceived in the issue of the grants. That was an essential part of the pleadings. *The Attorney-General v. Saunderson*, 1 Vic. Rep., Webb, 1870, p. 18. In this case the presumption should be the other way, especially as the Crown was in no way the complainant. The deeds brought forward were in form and substance the documents that should be found as the records of the issue of a perfectly legal deed of grant. The court was asked to presume that every one of the documents, including the deeds of grant, were simply not worth the paper they were written upon. The Court was also asked to presume that the sworn declarations of persons who were not parties to these proceedings, and who had had no opportunity of explaining anything or defending themselves, were simply a mass of perjury. Assuming, for the sake of argument, that there were certain irregularities and evasions of the Act in the completion of these titles on the evidence before the court, how was the court to know that the Crown, with full knowledge, had not waived its right to forfeit the selections? In that case the Crown could not afterwards set up any case to show that irregularities had been committed in the acquisition of those lands. That view was accepted in the cases of *Davenport v. the Queen*, L.R., 3 App. Ca., pp. 115 and 129; and *O'Shannassy v. Joachim*, 1 App.

Ca., p. 82. If they had chosen to slander their own title, first on the question of intrinsic value and then on the question of title, they could not ask the defendants to pay the difference between the advances and the amount realised from the sale of the securities. If the plaintiff company had notice as to the dummyming they must be taken to have acquiesced, and could not be heard to complain of the acts of their local agents in that respect. If it was within the scope of the authority of the local directors to lend money on "dummyming," plaintiffs could not be heard to complain if their agents had simply acted within the scope of their instructions. If on the other hand the plaintiff company had no notice of this "dummyming," if they lent money in ignorance of any such facts, and if they got titles in their names, then they were innocent parties, and their securities could not be affected by any knowledge or acts of their agents. An innocent person obtaining a security in innocence was protected. [LILLEY, C.J.: The question has not been litigated before. It raises an entirely new question—whether an innocent person having a Crown grant obtained by deceit would be protected. I laid down the equitable doctrine that he would, and I think I should hold to that. Of course my decision would be subject to review.] The question arose as to how far the notice or knowledge acquired by an agent who mixed himself up in fraudulent transactions outside the scope of his authority could be imputed to his principals. [LILLEY, C.J.: Subsequent assent is equivalent to precedent command.] Then the question arose, was the company affected by notice of matters which its directors or agents had acquired outside of the business of the company altogether, or was it affected by frauds or participation in frauds if privy to them or cognizant of them when such had been committed outside the scope of the authority of the agents? I submit that the company is not bound by any such notice. If the doctrine of knowledge was applicable it would be applicable even if only one had knowledge. *In re the Marseilles Railway Extension Company, L.R.*, 7 Chanc. App. Cases, pp. 161, 168, 169, 170. The authority quoted, and the fact that the plaintiff company had appointed solicitors in Queensland, and those solicitors in each case had certified that the titles were good and sufficient, show that any knowledge from which inference can be drawn that the defendants knew the contrary is not to be imputed to the solicitors of the plaintiff company. Sections had been quoted to show that if lands were acquired in contravention of the Act they were forfeit. If the Act was to be read in that way such forfeiture could only be affected after procedure in courts of law. Otherwise the Ministry of the day would practically be the judges of titles of every man

in the land who took up land under this Act. Those sections were read as if the mere fact of the Crown being satisfied, or pretending to be satisfied—or a step further, someone asking the court to assume that the Crown were satisfied—that lands acquired in contravention of the Act would at once render the land forfeited, and that, too, without any declaration by the Crown that they were forfeited. I submit that even if the Crown were a moving party towards having those grants revoked, the Crown could not do that without a proceeding in the courts of the country. Neither section 21 nor 101 apply to any case in which a deed of grant had been issued by the Crown; they apply to cases in which the lands were in course of being made freehold, and before the deed of grant had been issued. If section 21 provided the machinery for forfeiture, that section had gone because it had been repealed, though the rights were reserved. Plaintiffs instituted proceedings without taking steps to add the person who might have a claim under the Act. The plaintiffs themselves had neither a claim nor a right to set the machinery for forfeiture in motion. An opportunity was afforded to bring the matter before the court and the jury, and they failed to satisfy the jury on the facts. On the authorities cited they must fail to satisfy your Honour on the law. No person can question or litigate the validity of those titles but the Crown. The dummyming question did not fall within the Judge's original intimation or reservation. The whole of the reasons for finding the facts on this part of the case had gone. It was entirely separable from and inconsistent with the major part of the case which was originally brought. The original case, which was still persisted in, proceeded on the allegation that the defendants had lent money on securities intrinsically insufficient. The dummyming part of the case suggested certain matters as facts, which, if true, plaintiffs said deprived their securities of any validity. When the whole of the other part of the case had been agreed upon in favour of defendants it would be inequitable, I submit, to delay their judgment in order that some supplemental part or appendix to the case might be tried, which if really *bonâ fide*, could, he submitted, more profitably have been tried on a separate action. Plaintiffs now ask your Honour to find facts on evidence that was obtained by false pretences. When these questions were asked of defendant Grimley they were objected to by counsel for defendants on the ground that they were irrelevant. It could not be pretended for one moment that they were relevant as the record then stood, and my learned friend pressed them then on the ground of credit. The evidence extorted in that way was attempted to be used in support of the amendments. Whatever might

have been elicited in cross-examination of the defendants was attempted to be used in the same way. That evidence, which was of the most vague and flimsy character, was practically the only evidence before the jury on that part of the case. That evidence could prove nothing; it failed to prove anything. Plaintiffs attempted to strengthen it by the production of certain records from the Lands Department, all of which went to prove the genuineness of the titles. That evidence failed to satisfy the jury. They ask your Honour on that evidence, such as it might be, to find the facts against the defendants. I submit that your Honour will not pursue that course, but will in fact reject the "dummying" portion of the case altogether and dismiss that from your consideration, leaving plaintiffs to take such remedy thereon as they might think fit. On the question of the reservations, if your Honour had power to make them, there are cogent reasons why you should not act upon them. The mere fact that a jury did not answer every question did not show that the case ever got beyond them. That they understood the case was shown by the absence of any material inconsistency in the answers which they gave to the many questions put to them. I submit that the Judge having made an order for the trial of the case by a jury, not having taken any part of that case from the jury, and not having discharged the jury, the plaintiffs could not now be heard to have a portion of the case tried before the Judge alone. A further reason why the court should not, even if it had the right, act under these reservations was that the jury had been in court and had drawn in fees alone something like £700. That amount, however, having been spent were their findings to be paid no heed to, and treated as valueless? On all those grounds, assuming that there was any power, I ask your Honour not to act on the reservations. What right was there in a Judge to reserve for himself in a trial before himself and the jury the findings or any of the issues? There is no right, I submit, to make the reservations by virtue of anything which appeared in the order of the 16th October or in the intimation that was conveyed shortly after the case commenced. There had been no power conferred upon the Judge by the order of the appellate court. If there was any power to make them, it must be by virtue of something innate in the Judge himself. I submit that the law has conferred no such power on the Judge.

Lalley, on the question of the power of the Full Court to make reservation, drew attention to the case of *Hamilton and Co. v. Johnson and Co.*, 5 Q.B.D., p. 263; and on the power of the Judge to make reservations, to that of *ex parte Morgan*, 2 Ch. Div., p. 72.

Byrnes, S.G.: So far as the power of the court

went I am prepared to contend that the Full Court had not the power. The invariable practice had been to uphold the findings of the jury, if there was any evidence to support them. Otherwise there would be no end to litigation. The case of *Gilchrist, Watt & Co.* concisely expressed the views of the Full Court on the matter. My friend then proceeded to quote from "Daniels's Chancery Practice" and authorities bearing on the old practice of the Court of Chancery. When those cases were looked at in none of them could be found any authority in support of my friend's contention. There was a very great distinction between the trial of mere issues in Chancery and the trial of an action by a Judge and jury. In the practice in Chancery the Court of Chancery virtually occupied the position that the court in Banco held on the common law side. It was bound by the findings, and bound to give effect to them unless they were against the evidence, or unless there was no evidence to support them. They practically applied the same principles that the Court of Appeal would apply in Queensland. *Ex parte the Freeman of Sunderland*, 1 Drewry, p. 184; *Ferney v. Young*, L.R. 1, H.L., p. 63; *Imperial Loan Company, Limited, v. Stone*, L.R., 1892, Q.B., p. 599. The jury were the judges of the fact; for the Judge were all questions of law and the admissibility of evidence; and it was so laid down in *Comyns' Digest*, p. 573. If a person was refused his rights without a jury then he had rights which he could assert elsewhere. If a jury was allowed, the trial must proceed in the ordinary way, and when the jury returned answers to facts it was the duty of the Judge to record those answers, or if the Judge should think there was no evidence it was open for him to direct the jury in a particular way. On the findings as recorded it was the duty of the Judge to enter judgment on the law and the facts as he found them, but I submit that the Judge of first instance has no jurisdiction after the findings were recorded to vary the findings, or to supplement them by other findings in any way. Any application that a party might wish to make of that kind must be made to the Court of Appeal, and I submit the Court of Appeal would never interfere with the findings of the jury if there was any evidence to support them, and in no case would venture to answer questions that had been left unanswered. By no reservations can any power be conferred on the Judge of first instance, or for the matter of that on the Court of Appeal. I ask the court to enter judgment for the defendants with costs on the whole case and leave the plaintiffs if they thought they had any rights to pursue them elsewhere.

Power: I submit that the defendants are entitled to judgment with costs. The defendants had the

right to insist upon being tried by their peers. That right had been extended to them, and they were entitled to the benefit of the findings which the jury had given in their favour. The answers on what might be called the original case have been found in defendants' favour, and there is nothing to prevent your Honour giving defendants judgment on that part of the case and leaving the plaintiffs to commence *de novo* on the other part. On the whole of the findings there was no doubt that judgment ought to be given for the defendants other than Grimley.

Shand: Judgment should be for the defendants other than Grimley.

Lilley: I object to Mr. Shand being heard on the ground that on a motion for judgment it is not the practice for more than two counsel on one side to address the court. [*LILLEY, C.J.*: I wish to hear all that can be said, and without establishing a precedent I will hear Mr. Shand.]

Shand: All I have to urge is contained in the following propositions:—(1) That the findings of the jury were conclusively in defendants' favour on the whole case both in its original and in its ultimate form; (2) that if that were not so, so far as the allegations that were introduced by way of amendment towards the close of the trial were concerned, still no findings on these allegations were against the defendants, and that even if they were the allegations themselves established no case which called for any answer on defendants' part, or which therefore need be dealt with by the jury in any way; and (3) that the suggestion that your Honour should reverse or alter the findings of the jury was a suggestion which I respectfully submit the court could not legally and would not in any case adopt.

Lilley, in reply: A great part of the Solicitor-General's argument was addressed to the question of the reservations, and to asking your Honour to re-consider them. Until those reservations are overruled by the Court of Appeal the question is settled. As to the dummied question being litigated in a separate action, it has always been the practice of the court to dispose of all matters arising in an action if it could to save the expense of litigation. The Solicitor-General had contended that the question could not be litigated here in the absence of the Attorney-General, and quoted the cases of *Cumming v. Forrester* and the *United States v. Throgmorton* in support of his contention. Those cases went to show that where a suit was brought to set aside a Crown grant the Attorney-General must be a party. The distinction between those cases and this was that the plaintiffs were not asking to set aside the grant, but they said that the circumstances of the case showed that those grants were liable to forfeiture, and were subject to forfeiture at any time by the Crown.

The Solicitor-General said the plaintiffs were either innocent persons or they were not, and showed pretty conclusively that the company were innocent. He then showed that they were not affected by notice or knowledge in any way by notice to their directors in Brisbane, and for his proposition the authority he quoted was the *Marseilles Extension Railway Company*. With that proposition I entirely agree. The plaintiffs are innocent, and the case quoted has been cited with approval in that of the *Panama and South Pacific Telegraph Company v. Indiarubber Guttapercha Telegraph Works Company*, L.B. 10, Chap. App., p. 523. Mr. Power had argued that the Crown would be estopped from exercising the right of forfeiture. On that contention I cite *Everest and Strode* on Estoppel, pp. 8 and 9. With respect to the argument of Mr. Feez, who said that because the company and Mr. Grimley were both parties to an illegal transaction, the company could not recover judgment against his client, I refer your Honour again to the argument of the Solicitor-General as to the company being innocent. Not being *in pari delicto*, although they might have been parties to an illegal transaction, they were innocent. *Brown v. Morris*, 2 Cowper, p. 790; *Osborne v. Williams*, 18 Ves., p. 379; *Rainhill v. Spry*, 21 L.J., Ch. Div., p. 633. With respect to the reservations I mention the case of *ex parte Morgan*, 2 Ch. Div., p. 72. I submit the plaintiffs are entitled to judgment in the terms which I have moved for.

Feez, in reply, contended that the transactions being illegal the securities held by the plaintiffs were illegal and therefore void. He now wished to contend that the securities were good. If this transaction was absolutely illegal it could not be enforced against anybody, and least of all against Grimley. Mr. Lilley cannot have the advantage of the mortgages and at the same time have them set aside. If the mortgages went the claims of the plaintiff went with them.

Byrnes, S.G., in reply: Mr. Lilley for the first time in the case has raised the question whether innocent persons who had acquired titles innocently were liable to have those titles set aside if the lands they covered had been dummied. On that point I quote the law laid down by your Honour in the case, which had never been questioned by Mr. Lilley. On the argument on the amendments I contend that they should not be allowed, because the raising of this question would lead to unsettlement of titles throughout the country. That point was referred to his honour in Chambers, and his Honour was reported by the *Courier* to have held that an innocent purchaser for value received was protected. [*LILLEY, C.J.*: I think there are decisions, but I cannot recall them. It is a matter which it is not necessary for me to

decide to-day. It is assumed that the Crown in its dealings will be guided by the ordinary rules of equity.] The law was laid down in that way to the jury, and no exception was taken to it by the plaintiffs. That being so, that must be the law governing the case. Mr. Lilley cannot argue in one breath that the securities were bad and in the next contend that they were good. As to the Crown not being subject to estoppel, the highest courts had decided that the Crown was bound by waiver in the same way as an ordinary individual. That was the decision in the well-known case of *Davenport v. the Queen*. More than that, if the Crown had by any instrument out of Court disclaimed any right to these lands the titles of the holders would be good. Under the Real Property Act of 1861, s. 11, subs. 5, the Registrar-General had power to lodge caveats against the title of any person. No such caveat had been lodged in this case, though there had been ample opportunity for that to be done. That being so, the innocent person in possession will have superior rights to the unregistered rights of the Crown. My friend has said that it was not necessary for him to show that the titles were void, but the Crown grants having been produced, all my friend's arguments and supposed facts were met by the production of those instruments. The Crown grant having been produced, it must be presumed to be a legal and authoritative instrument.

LILLEY, C.J., reserved judgment.

On Tuesday, 16th August, 1892, His Honour The Chief Justice delivered his judgment—which will be found in the supplement supplied herewith.

On Thursday, 18th August, 1892, argument was heard on the matter of the costs of the action.

Lilley, on behalf of the plaintiff company, cited *Jones v. Curling*, 13 Q.B.D., 262, and *Cooper v. Whittingham*, 15 Ch.D., p. 501.

Feez, on behalf of defendant Grimley.

Power, on behalf of defendants other than Grimley, followed.

On Tuesday, 24th August, 1892, His Honour The Chief Justice delivered his judgment on costs, which may be found at the end of His Honour's judgment on the case referred to above.

On the 15th September, 1892, the appeal from the judgment of Lilley, C.J., was heard before Windeyer, Cooper, and Chubb, JJ.

All the defendants appealed from the judgment of Lilley, C.J. By consent, the appeal of the defendant Grimley was heard with that of the other defendants.

Byrnes, S.G., Power, and Shand, for the defendants other than Grimley. Feez, for defendant Grimley. Lilley, and Woolcock, for the plaintiffs.

Byrnes, S.G.: This is an appeal from a judgment of His Honour The Chief Justice, given on

the 16th August, 1892. The appeal is on various grounds, but, for the present, it is sufficient to take the first ground, in which the defendants ask that so much of the decision as is not in their favour may be set aside and judgment entered in their favour, on the ground that the judgment is wrong as upon the findings of the jury. The case came into Court and lasted a considerable time. After a long summing up the whole of the case was submitted to the jury on a series of questions based in great part on the pleadings. A few of the questions were put by the judge. On the law with regard to the position of the directors there was really no dispute. The judge told the jury that if they honestly exercised their ability in the interests of the plaintiffs they were not liable for the consequences of their acts. It had been decided that the directors were not trustees, and were not liable to the same extent. If anything, a less degree of care was required of the local board than ordinary directors, because they were liable to be removed at an instant's notice by the principal board at home. The degree of care that was due from them was more that of an agent to a principal. They were bound to exercise their honest judgment in obedience to their instructions given by the London board. Question 42 I asked the judge to strike out on the ground of ambiguity. My friend opened that these were really land purchases by the plaintiff company, and they entered into them unauthorised by the home board. The forty-fifth question seems to bear that out. But the advances were really not made until after the mortgages had been executed, and until the company's solicitors had certified that they were in order. [CHUBB, J.: Is this one of the questions under *The Crown Lands Act*? Lilley: Yes; under section 21. CHUBB, J.: Assuming that these titles were incomplete, was there any evidence of an arrangement that plaintiffs were to advance the money and the land was to be transferred to them as mortgagees?] There was no direction and no evidence. I am only drawing attention to the ambiguity of the question. [CHUBB, J.: Taken by itself I do not see any point involved in the question. It all depends upon the meaning of acquisition. WINDEYER, J.: Do you say that there is no evidence that there was an agreement with the selectors to permit the selectors to acquire the land? Lilley: An agreement between Grimley and the selectors to allow Grimley to acquire the land to transfer it to the defendants.] I called the learned judge's attention to it at the time, but he had not given any explanation of what the question meant. Questions 44 and 45 summed up the whole case against us. Question 44 was a question which I had put; question 45 was put by the learned judge. [WINDEYER, J.: It would be perfectly possible for a

person to believe, and most sincerely, that he was advancing on good security, even though he knew that the selections had been dummed.] That is our contention, and that was why I asked to have the 45th question put. If Your Honours will compare the answers given by the jury with those given by the judge you will see that they answered the question so as to express their opinion that whether there was dummieing or not the defendants honestly believed that the securities were good and sufficient. [WINDEYER, J., to Lilley: I suppose that you want to utilise the effect of question 44? Lilley: The learned judge wanted to distinguish between two classes of securities. WINDEYER, J.: What is the meaning of this apart from the question of dummieing?] The second question, 45, is a perfectly meaningless one. The answers of the jury, contrasted with those of the judge, show that the jury thought that the defendants honestly believed that the securities were good and sufficient. [CHUBB, J.: What did the judge say? Lilley: I have no evidence that they exclude the question of illegality from their consideration, even if they could in determining the value of the security. WINDEYER, J.: Taking that with the answers of the jury, the jury appear to have thought that, under all the circumstances, whether there was dummieing or not, the security was sufficient. In point of fact His Honour has read their answer as if they had taken that into consideration. CHUBB, J.: His Honour says that they could not separate it. Therefore they must have taken it into consideration.] And the jury say, notwithstanding that, that they believed that the directors honestly believed that the securities were good. I want to call Your Honour's attention to the circumstances. [CHUBB, J.: What His Honour must have meant is this—"You answered No. 44 without taking into consideration the allegations with regard to dummieing." Lilley: Yes, that is it. CHUBB, J.: That is what he must have meant, or might have meant. I do not say that the jury did not take the whole of the circumstances into consideration; but that is probably what they meant. WINDEYER, J.: Is there no answer by the jury as to whether the securities, independent of the money value apart from the question of dummieing, were sufficient securities?] There are many answers to that. Many of the questions are all answered in the same way. [WINDEYER, J.: Is there no finding by His Honour on that, or does he introduce the question of the insufficiency of the security?] No. [WINDEYER, J.: There is no finding that the securities were not substantial apart from that question?] No. The findings of the jury on that question are entirely in our favour. [WINDEYER, J.: And there is no finding of the judge the other way?] No. As regards

the valuations, the plaintiffs called only one witness. He valued in 1889, but said he valued as in 1882, and gave an all-round valuation of 34s. 6d. an acre. That is the lowest valuation that has been put on the securities, and against that we have a number of witnesses whose average is about £2 8s. 6d. an acre. I was going to call His Honour Mr. Justice Windeyer's attention to question 16A on the matter of valuations. [WINDEYER, J.: I suppose His Honour used the term "grossly insufficient" because he held that, if they made a slight mistake in a valuation they were not answerable for it.] He was really following the pleadings. The words are used in the Statement of Claim. [WINDEYER, J.: Then it may be taken that he asked the jury this way:—If you do not find they were guilty of the negligence charged you ought to find for the defendants.] He told the jury on that question that the defendants were not liable for a mere error of judgment, that if they were not careless and negligent they would not be liable. Of course His Honour all through the summing up dwelt a great deal on this question of illegality. On the question of intrinsic value we called experts whose examination took up days. [WINDEYER, J.: I notice an assumption on his part that they were of sufficient intrinsic value. He regarded the evidence as all one way. That made it all the more important to have this clear finding of the jury on the question of knowledge and belief.] In the address of my learned friend to the jury it was almost conceded that the securities were intrinsically sufficient. His address was largely directed to the question of title. [WINDEYER, J.: Are directors supposed to have a knowledge of conveyancing law?] I submit certainly not. There is certainly no authority for any such proposition in regard to the dealing of persons in the positions of agents and principals. Agents are supposed to exercise their honest judgment, but they are not supposed to be lawyers. [WINDEYER, J.: Was there any question put to the jury as to whether there was dummieing?] I intend to deal with that part of the case entirely by itself. There were some questions. When His Honour put the forty-fifth question I objected to it on the ground that it rendered the previous question meaningless. [CHUBB, J.: His Honour seemed to take this view—that if the defendants knew of the dummieing they could not possibly have an honest belief as to the sufficiency of the security. Lilley: That is exactly it. WINDEYER, J.: It is a question on which even lawyers might differ. COOPER, J.: If they had acted contrary to the advice of their solicitors, they might have been charged with negligence.] Exactly; and if they had driven good business away by not acting upon the advice of their solicitors, their relations with the home board would soon have terminated.

I will now deal with the question on the issues under the defence of the local directors. As to the question of knowledge, there was ample evidence that the home board knew all material facts. The evidence was one way entirely—that if there was any dummying, they knew at least two years before the action was begun in this case, and at least five years before any amendment was made in the pleadings raising any question of dummying. That question was, of course, most material when your Honours come to consider whether the amendments should have been made. What would the Court say when application was made to raise an entirely new case after the information had been in their possession for over five years? It was a stale demand that they could at any time have set up had they wished, seeing that they had sufficient knowledge to put them on inquiry. In the case that the defendants came into Court to fight the allegations of the plaintiff were that they had committed breaches of duty in advancing money to Grimley to enable him to purchase land, the purchase not being for his own benefit, but for the benefit of Bell and Sons and the Darling Downs and Western Land Company, Limited. On these allegations the jury had found entirely in the defendants' favour in that the advances were for the benefit of Grimley himself. In all probability that would not be material, for if the advances were made for the benefit of the plaintiff company it would not matter whose benefit they were also for. [COOPER, J.: That allegation about Bell only became of importance to the plaintiffs in consequence of their other allegation that the three defendants were Bell's executors *Lilley*: No.] I will take that it was so. The plaintiffs said that if the money was advanced for the benefit of Bell they should have had Bell's personal covenant to repay it. The jury found that it was not for the benefit of Bell, and that the security was sufficient. So that, even if it had been for the benefit of the Bells, if the securities were adequate the defendants could not be made liable for any loss resulting from the loans. It was further charged that the securities were grossly insufficient. On that the jury had found entirely in favour of the defendants. With regard to the mill loans, the allegation was that they were not made *bona fide* for Grimley, but for the Queensland National Bank. The jury found, on overwhelming evidence, in favour of the defendants. In fact, on every part of the case as it was originally brought into Court the defendants had succeeded. [WINDEYER, J.: Are there no further findings of the Judge except those you have referred to?] Not on the original case. The defendants said with regard to the question of dummying that it had been raised too late. They submitted to the learned Judge that the case had

lasted from 1888 to 29th March, 1892, and they were certainly entitled to judgment. When the jury did not come to a conclusion on the dummying part of the case, there was nothing to prevent that being the subject of a separate trial. It was a perfectly distinct case, and as a matter of fact the evidence that was adduced by plaintiffs on the question of dummying lasted only about half-a-day. The defendants contended on the motion for judgment that, at any rate, they were entitled to judgment on the major portion of the case dealing with the questions of *bona fides*, care, and sufficiency of securities, and that, if the plaintiffs wanted to persist in this extraordinary attempt to damage their own titles, because it would serve no other purpose, the Court ought to leave them to take any course that they thought fit. The defendants appealed from the entry of judgment on the ground that, on the finding of the jury on the original part of the case, they were entitled to judgment. In any case, they should certainly have got the costs of the proceedings up to 29th March. [WINDEYER, J.: Could the Judge have given the judgment that he did on the case as it originally stood, apart from the question of dummying?] Yes. Assuming that all the facts had been brought in against us, we should have been here to ask to have them set aside, on the ground that the findings were entirely against the evidence. The amendment raised an entirely new case. Of course that could not have been raised without amendment. [CHUBB, J.: Is there anything in the judgment which amounts to anything more than a judgment in a common law action? Is the relief given any more than common law relief?] No. What The Chief Justice found was this:—As against Grimley "You are liable in debt to the sum of £66,000 odd." As against the other defendants "On certain matter you are not liable, but on the others you are liable to the full amount advanced, because the securities were absolutely insufficient." If there was anything in the action of an equitable nature before the amendment, there was certainly none in the judgment by His Honour, for this reason—Assuming for one moment that, as the case originally stood, the defendant Grimley was sued on debt, the other defendants were sued for the difference between the amount advanced and the intrinsic value of the securities, or what they would be likely to realise if sold. That might have necessitated the taking of an account, but His Honour did away with the necessity for that when he found against Grimley in debt, and against the other defendants in specific sums, because he found that the securities had no value whatever, and defendants were liable to the full amount. [CHUBB, J.: Could not judgment have been for the defendants to have paid up and taken the securities?] Exactly

[WINDEYER, J.: After this judgment it could not be supposed that anybody would buy these dummied selections.] His Honour has decided that there is no security. The position is this:—The plaintiffs are in possession of this mill, and since this action was commenced, the mill, which is supposed to be on dummied land, has been carried on by the plaintiffs. They are in possession of the selections, and are receiving rent for them. That is the position which they are in. The plaintiffs are in possession of both the mill and the selections. They say Grimley's securities were not worth a rap, and my friend quoted a lot of cases to show that you could not enforce an illegal agreement, and in the same breath he asked for judgment against the defendant Grimley on one of these illegal covenants. They are trying to eat their cake and have it. They are in possession, and have been carrying on the business of millers, cutting the timber and selling it. We have no title, and they are in possession, and they want to recover damages against us. The position is a very extraordinary one as far as the defendants are concerned. As far as the plaintiffs are concerned, they are absolutely on velvet. The titles are to be slandered, and the land declared to be of no value, and then they ask to be paid the advances which have been made in perfect good faith. We say that if these titles are questioned the Crown ought to be here to be heard. I intend to argue the question of *The Real Property Act* if necessary, as far as the rights of the Crown are concerned. [CHUBB, J.: It has already been decided in the *Mount Morgan case* that a Crown lease is indefeasible until attacked by the Crown, and it can only be attacked by a writ of intrusion—following a South Australian case.] That is the case of the *Queen v. Hughes*. It was held there that a writ of intrusion was the only remedy in such cases. If called upon we intend to argue this question. Now I will deal with the new case made by the amendments asked for and allowed at the end of the trial. It was a matter of considerable importance, not only to the defendants in the present case, but as establishing a precedent how far a Judge might go in allowing amendments. On the twenty-eighth day of the trial, and after the matter had been in litigation since 1888; after the plaintiffs had given evidence as to the value of the securities; after the defendants had given evidence in their own behalf; and after evidence had been offered in rebuttal (which was objected to and refused by the learned Judge) immediately afterwards, my learned friend, Mr. Lilley, rose and asked leave to make certain amendments on the question that the securities were of no value whatever, as the lands had been dummied. There was nothing on the pleadings to point to it, and the very fact that they were suing their mortgagor shows that they

believed that, as between Grimley and themselves, there was a valid agreement. As to the question of amendment, there is no doubt that is a matter within the discretion of the Judge, but it can only be exercised, I submit, on some well recognized principle—not at the mere caprice of a Judge, but with some legal discretion. The first question to be considered is, was the application *bonâ fide*—was it an effort on the part of one of the parties to get a matter of contention between the parties before the Court? and, secondly, could the amendment be allowed without doing substantial injustice to the other persons? The very nature of the application shows that it cannot have been honestly made. It was made only because the case originally brought had completely broken down. Could it be allowed for a moment that a mortgagee under such circumstances should come forward and ask to have the security of his mortgagor declared illegal by the Court? The securities had been held for eight years, but no one had taken the matter up until that day. And to prove that the plaintiff company had previous knowledge of the dummied, I call your Honours' attention to two letters—one written by Mr. Lyttleton in 1887, and another written by Mr. Finlay in 1888, immediately before the issue of the writs. [CHUBB, J.: Your point is shortly this:—that if the lands were dummied they knew it.] Yes; but I direct your Honours' attention to the fact that, in summing up, the learned Judge directed the jury there was no evidence as to acquiescence. Having got judgment on the covenant against Grimley, the plaintiffs seek judgment against the other defendants on an admission by Grimley which might have brought him within the operation of the criminal law. I submit the Court will not allow, especially in a case of fraud, a new case of fraud to be gone into after the first has completely failed. I refer your Honours to a decision given on the same point by Lord Cairns (6 E. & I. App. pp. 434-453). The question as to dummied was a forethought deliberately concealed by the plaintiffs' counsel. Even if the amendments were allowed the Crown should have been a party. I refer your Honours to the case of the *Government of the United States v. Throckmorton* (93 U.S. Reports, 8 Otto, p. 61). The case there was on all fours with the present one. The defendants raised the question that the Attorney-General should have been made a party, and the fact that he had not been was urged by them as a reason why the application for the amendment was not *bonâ fide*. The plaintiffs did not give any evidence to show what position the Crown would take up with regard to these particular titles. They never asked the Crown what its intentions were with regard to those particular titles, and the Crown never showed any disposition to interfere with the

titles. [CHUBB, J.: There is the case of *Osborne v. Morgan*, 2 Q.L.J., 113, decided by the Court here.] I only cited this case to show that the practice in England and America is the same. That was simply a case of a Crown lease, but the present case was of a Crown grant, and a Crown grant registered under the provisions of *The Real Property Act*. It therefore stood on even a better position than a Crown lease, which was merely a mining lease. Furthermore, it was not a case of a guilty person objecting. The plaintiff company came in and said they were innocent persons, *a fortiori*, in any case if they were innocent mortgagees the Crown could not have succeeded against them. It was not as in the case cited by Mr. Justice Chubb, where presumably guilty persons were in possession of the property. In this case it was presumably innocent persons who were in possession, because, if the mortgagees were not innocent, they had no claim to come into Court and question the acts of their directors. If they were innocent, then they were protected as against the Crown. On this point I will call your Honours' attention to section 96 of *The Real Property Act*, as showing what position the Legislature of the colony had given to a title under *The Real Property Act*. On the motion for judgment, and on the argument on demurrer, I contended that, assuming there had been breaches of the Act committed, all the evidence on that point was answered by the production of the Crown grants. Even if the Crown could then have proceeded on the ground that they were deceived in the issue of the grants, it would have been very difficult for them to do so. There was not a tittle of evidence that the Crown was deceived in the issue of the grants. The evidence in fact was quite the other way. When the amendment of the pleadings was asked for, my learned friend said that he did not get his evidence until the end of the case, and therefore he could not make the application for amendment before. On that point I wish to call your Honours' attention to this. My friend at the outset of his case said something about dummying, with the object of showing on the issues the intimate connection between Grimley and the Bells. He then got in evidence what under no set of circumstances could be evidence against the other defendants. I objected that there was no issue between the other defendants and the plaintiffs on that point. Mr. Lilley should then have applied for amendment, but he did not do so. Mr. Feez also objected on the same ground, but the learned Judge said that he could not interfere with the liberty of the Bar, which was as old as the liberty of the Bench, and counsel could conduct his case as he thought best. I renewed my objection, when at a later stage the plaintiffs put the defendant Grimley in the box, on the ground that the

questions asked might tend to show dummying. [WINDEYER, J.: As material?] Yes. That is the evidence which they have since got to support their case against the defendant on this particular point. What took place was this:—We objected to the evidence, and my friend then said he would ask the questions as to the witness's credit. The evidence of Grimley was got in when he was being asked as to his credit. [CHUBB, J.: Was the relief against Grimley other than he had offered to submit to?] No; in fact it was less. When his offer was refused he called evidence which showed that the plaintiffs were not entitled to 9 per cent. interest as they claimed, but only 7 per cent. The jury found for Grimley on that. The reason why Grimley was retained in the suit became apparent as the suit progressed. All sorts of evidence was tendered against the defendants which could in no sense be admitted against them. [CHUBB, J.: On what evidence was the amendment applied for—on the credit evidence from Grimley?] Yes; and I presume on certain questions asked of the four defendants in cross-examination, and the evidence was not complete then, because they not only got leave to make the amendment, but to call further evidence. If we had known that they were going to raise the question of dummying, we could have taken evidence to meet it in England. I am going into this in order to show that this is a case in which costs cannot compensate the defendants for amendment. There is no doubt that Grimley, on the authority of the case of the *Attorney-General v. Simpson*, 1 Q.L.R., (pt. iii.), 19, could have refused to give this evidence on the ground that it might tend to criminate himself. There was a deliberate suppression of this portion of the case in order that evidence might be extorted under false pretences, so that when the case was closed a new case might by amendments be sprung upon us. [CHUBB, J.: Will you refer to the case of *Riding v. Hawkins*, 14 P.D., p. 56? Lilley: That is the case which I quoted to His Honour, and on which he allowed the amendments.] Even after the amendments were allowed the evidence which was called from the Lands Office showed that Grimley had scrupulously observed all the formalities of the Act, and that the transactions were *bond fide*. [WINDEYER, J.: Suppose a man takes up land in Queensland in a *bond fide* manner, and after it has been in his possession for some time he finds he cannot carry on, is there any law making it illegal for him to borrow money, or to mortgage his property for him to carry on?] It has never been decided that it is illegal. The practice and the public belief has always been the other way. Your Honour's experience will tell you that many of our settlers would be absolutely unable to settle on the land without some such assistance. The pleadings

did not set forth that the defendants knew of the illegality in connection with the lands, or that the Crown had been deceived in the issues of the grants. We also said that no one could raise the question but the Crown, but there was no allegation on the pleadings that the Crown had interfered or contemplated doing so. His Honour The Chief Justice went on an entirely different principle. He said that the lands having been obtained by fraud, the deeds of grant were so much waste paper. He went further than that—he said that under *The Crown Lands Act of 1876* the Crown could forfeit any deed of grant if they thought fit without hearing. [WINDEYER, J.: It may save time, Mr. Solicitor-General, if we say that we are with you so far—that there must be some judicial proceeding before a Crown grant is upset. Were it not so, no man in the colony would be safe.] Then I am forced back upon my previous contention. Was it not a fact that one case having failed the plaintiffs had brought another to save their costs, and also to save the seats of the directors who brought the actions? As to the liabilities of the directors, in consequence of knowledge acquired other than in their positions of directors, I quote the case of *ex parte the Marseilles Railway Extension Company*, 7 Ch.D., 161-168. I have been arguing that in no set of circumstances could the plaintiff company, being innocent holders of the securities, invalidate them. So far no step has been taken to invalidate them, and, no damage having been therefore sustained by the holders, the action was premature. Some damage would have to be done to the plaintiffs' securities before they could claim damages. They had jumped before they had got to the stile. They asked the jury to assume that the Crown would succeed supposing they took any action to invalidate the titles, forgetting that there was a Crown grant in the way before the Crown or anyone else could succeed. They knew that, practically, the whole real property of Australia would be affected, because nearly all of it was held by Crown grants. I do not think there is anything novel in *The Act of 1876* which is not to be found in all Acts dealing with the alienation of Crown lands throughout Australia. I submit that that and all other Acts of a similar sort were intended to deal with circumstances which might arise prior to the issue of the grant. All their provisions were, as it were, operative prior to the issue of the grants, and after the grant had been obtained any action with regard to the land depended not upon these Acts, but upon the general prerogative of the Crown. When the Crown grant had been issued it became a question solely between the Crown and the individuals to whom the grant had been issued, and whatever right the Crown might have had to be determined by judicial inquiry. I do not contend

that the Crown even after the issue of titles cannot attack those titles, but I say that the Crown can only do that on one ground, and that is, that it has been deceived in the issue of the deed of grant. [CHUBB, J.: Is there anything in the Act expressly saying how forfeiture is to be declared?] Section 88 provides that it shall be by proclamation in the "Government Gazette." In the *Queen v. Simpson* it was gazetted before the Crown took any proceedings. It was made a preliminary step, and then the Crown came into Court to have the proclamation legalised. When the Court decided that the defendant was not bound to answer questions which might incriminate him the whole of the proceedings terminated. On the decision in that case Grimley could have refused to give any evidence whatever. The 21st section of *The Act of 1876* was really a prohibitive one, but I maintain that it did not apply after the deed of grant had been issued. In the present case there was no contract, nor was any money advanced until the deeds had been issued. A promise might have been made to advance money when the deeds were bought; but that could not be held to be a legal or binding contract. There was nothing illegal in a promise of that kind, nor did it touch the policy of the Act. [WINDEYER, J.: Your contention is that the grants are voidable, not voided?] That is my contention, and I say that they are only voidable by the Crown proving its case up to the hilt. After the deed of grant the onus is completely shifted from the selector to the Crown. Then I will not trouble your Honours any further on that point. I will now call your attention to the questions which have been asked on the amended part of the case, and to the answers given by the jury, and by the Judge. [WINDEYER, J.: We should like to hear counsel on the other side as to knowledge on the part of the other defendants.]

Lilley called attention to the evidence which Grimley had given under cross-examination by *Feez and Power*. [WINDEYER, J.: Where is the evidence there of knowledge?] On the nineteenth day of the trial Grimley had given further evidence. He had been called for the purpose of showing what the advances were made to the selector for. On the twenty-second day Sir Thomas M'Ilwraith gave evidence, in which he said that he knew money had been advanced to the selectors, but he did not know any of the other particulars. Grimley had told him of the endeavours he had made to obtain the selections for the Bell family, but said they had failed. When he made application to the Investment Company for the loan, Sir Thomas M'Ilwraith understood it was for himself. Counsel read selections of evidence given by Sir Arthur Palmer, Sir Thomas M'Ilwraith, Mr. Drury, Mr. Hart, Mr. Morehead,

Mr. R. de B. Hovell, and Mr. G. L. Hart.

WINDEYER, J., (to the Solicitor-General): We have been thinking if we could save time, yours being a long argument, whether it would not be sufficient for you to reserve what you have to say until we have heard what Mr. Lilley has to say on the effect of this evidence. You had better take up your argument on that point, because Mr. Lilley will have to answer you as to that.

Byrnes, S.G., continued: When I left off I was proceeding to deal with the questions that were put with regard to dummyming. On some of these questions the jury agreed, and on others they disagreed. On some of them they found in favour of the defendants, and I submit that on those answers they were entitled to judgment. The question 11A raised the question whether the lands were originally *bona fide* taken up by the selectors for their own use and benefit. I read the sworn declaration of Samuel Moffat, and contend that there was not the slightest evidence against the *bona fides* of the selectors. His Honour has asked several questions on the question of acquiescence. The jury have answered all questions of acquiescence in our favour, and now I would call attention to the fact that they asked for assistance in answering them. I submit that they did not get it, and that His Honour did not give them the direction which he should have given under the circumstances. After the jury had retired they came back and asked for directions as to what they should do with regard to the questions as to dummyming if there was insufficient evidence. [WINDEYER, J.: What the jury wanted to know was whether the onus of proof as to dummyming rested on the plaintiffs, and if it was not for them to prove it. If the balance did not incline in their favour, then they were to find for the defendants.] That is exactly what they wanted to know; and after the jury had retired I asked His Honour to direct them that, unless there was absolute and distinct proof to their satisfaction as to the dummyming on the part of the defendants, the question on that point must be answered in their favour. His Honour, earlier in the case, had told Mr. Lilley that there was no proof of acquiescence; but later on he said he would reserve the question. I applied to him to direct the jury that there was no question of acquiescence in the matter under *The Judicature Act*. [CHUBB, J.: The Judge can put any questions to the jury, but if he does so you are entitled to have directions on them.] I pointed out to him that if the lands were dummied in 1887, there was plenty of evidence in the letters which were written home to the English directors in 1888, whereas the suits were not commenced until 1892. I submit that if that direction had been given to the jury they would have answered all of them, as

regards the dummyming, in our favour. The proposition which I am now going to seriously put before your Honours is this—that when lands are not in the first instance taken up in a *bona fide* manner, if they have been dummied, they revert back to the Crown; but if a man takes up land in a *bona fide* manner, and afterwards requires assistance to go on, any contract which he might enter into before the issue of the fulfilment of conditions, might not be so binding as to be enforceable; but if the party after the issue of the fulfilment of conditions renews it, the contract is perfectly good. The next part of the case I come to is this—and it is very important, not only in this case, but as a matter of precedent. It is important there should be a decision of the Court as to the relative positions of a Judge and jury when a case is to be tried by a Judge and jury. The learned Judge evidently considered that he had an inherent right in a case where there was a Judge and jury to take the case from the jury. He further contended that he had this right under orders which he himself had made with regard to this case, and also by reason of reservations which he said he made. Now, I intend to take this view—that if there is a trial by Judge and jury the Judge has no right to discharge the jury and take the case into his own hands, as far as regards questions of fact. The only circumstances under which a jury can be discharged are these:—Where one of the jury die, and the jury has to be discharged and a new one impannelled; if the parties consent to the discharge; and where one of the jury, by consent, leaves the Court—which would be equivalent to a discharge; where a Judge is of the opinion that a plaintiff has failed, and gave a nonsuit; and if a jury disagree—in which case a fresh one would have to be impannelled to re-try the case. In this case none of these things occurred, but the Judge took the answers, subsequently altering some of them, and inserting answers to others of the questions which were not answered. I submit there is no right for a Judge to do anything of the sort. And if the inherent right is not here, he certainly cannot give it to himself by any reservation which he says he is pleased to make. But the Judge contended that he had the power given to him to ignore the jury, because before the passing of *The Judicature Act* the action would have been an equity suit. Originally the plaintiffs took out a summons for the action to be tried by a Judge, but the defendants would not agree, and asked to have, not the issues alone, but the action itself tried by a jury. [WINDEYER, J.: Under what section did you move, Mr. Lilley?]

Lilley: The practice of the Court is this:—When the plaintiff gives notice of trial of an action by a Judge, and the defendants ask for a

jury, if the plaintiff wishes to raise the question whether the action was one to be tried by a Judge, or by a Judge and jury, he takes out a summons in chambers. The Judge then acts under rule 28.

WINDEYER, J.: Was this a case or matter which, previous to the passing of the Act, could have been tried without a jury?

Byrnes, S.G.: We say no; and His Honour must have been of the same opinion, because he gave us a jury. [WINDEYER, J.: Do you say that this was a matter that, previous to the passing of this Act, could have been tried with the jury with the consent of the parties? Lilley: I say that before *The Judicature Act* this would have been a Chancery case, and there is no instance on the books—and I have looked very carefully for one—of a case ever being tried as a common law suit in which directors have been charged with misfeasance. I have found numerous cases on the other side. I defy my friend to put his finger on one.] This was a case of principals against agents. The local directors were agents, and the action against them was for damages for neglect of duty. [CHUBB, J.: Grimley was entitled to a jury absolutely. It was a question how much he owed.] Yes. Even as far as Grimley is concerned the learned Judge has taken on himself the right to answer these questions, because he answers the questions affecting Grimley as well as having them answered by the jury. Some of them he answered differently. The matter which His Honour had to decide was whether it was a case to be tried by a Judge, or Judge and jury. Once being decided that it was a case to be tried by a jury, he had no power to alter it and make it a case to be tried before himself. [CHUBB, J.: If he had the power he would not require to make reservations.] If he has not the power, reservations will not give it to him. I submit that there has never been a case in the history of English judicature in which a Judge has made an order reserving leave to himself the right to interfere with an order that he has originally made. The plaintiffs made an application to have the jury done away with. An order was made on that that the jury was to remain, and the Judge reserved to himself the right to discharge the jury, and to try the action without them. Would it not be subversive of every principle of trial by jury if a Judge sitting with a jury could make up his mind on the facts of the case as it went along, and at any time he liked say, "I am trying this case and have come to my own conclusions on it." That would be contrary to all we understand by trial by Judge and jury. The more capable and honest the Judge was, the more he would insist in impressing his views on the jury, because he must have come to conclusions, and he must try to force them on the jury. What would be the position of the jury

in that case? They would be absolutely at the mercy of the Judge. He would be able to say to them. "You can come to whatever conclusion you like; but I will capsize it afterwards if I like." As a matter of fact His Honour had adjourned the case two months ahead before he discharged the jury. They were discharged in the ordinary way, having finished their function. Comparatively few of the questions put to the jury have not been answered. It is only with regard to one or two questions that answers have not been returned, and even on those, on the Judge's view of the law, there was sufficient evidence to give judgment for the defendants. [WINDEYER, J.: In discharging the jury did His Honour say he discharged them because they had disagreed?] No, your Honour. The jury were standing waiting for a quarter of an hour or twenty minutes, and heard me asking His Honour to take the case earlier. What is the meaning of a motion for judgment? It means that the parties move after the facts have been proved. [WINDEYER, J.: Has it ever been suggested that you could not make that motion because there was nothing to move it on?] No, it has never been suggested. [WINDEYER, J.: When the motion for entering judgment came on, did you argue it upon the findings of the jury, or upon His Honour's findings? When he was going to re-try the case himself, he would give his findings, and you would argue on his findings?] No, your Honour; that did not take place. As a matter of fact, I argued on the findings of the jury; there was nothing else to argue upon. My friend asked His Honour to exercise powers under the reservations, and alter the findings, which Mr. Lilley said were monstrous. We argued on this motion for judgment for a week, and then the Judge adjourned judgment. He did not deliver judgment till 16th August. [WINDEYER, J.: Did he ever give it to be understood that the result would depend, not upon the findings of the jury, but upon the view he took of the case? Lilley: Yes.] It was impossible to say at that time what conclusions he had arrived at. All we had for certain was the findings of the jury. When the motion for judgment came on he said he would allow us to argue any question of fact or law. I declined to argue the question of facts on the motion for judgment. [WINDEYER, J.: Of course, matters of law cannot be argued except upon certain facts before you.] My friend made application to His Honour to act on the reservations; but the Judge abstained all along from saying whether he was going to do that or not. All I had was the findings of the jury. I was not going to argue the question of other findings. [Lilley: His Honour said that the jury disagreed on the material part of the case. CHUBB, J.: How could he enter judgment on the

findings and set them aside as well?] That is what I argued strenuously. I said His Honour was assuming the duty that even the Court of Appeal would not assume, in that, if the findings of the jury had been entered, the Court of Appeal would not have set them aside if there was evidence to support them. My friend asked for judgment on the findings as they stood. The Judge said nothing about acting on the reservations. [CHUBB, J.: The motion for judgment is always on the facts found.] That has always been the practice. I may say that through the whole of the summing up of the Judge to the jury, the Judge left all the facts to the jury. Over and over again he said so. He said, "You are the judges of the facts; do not take my answers or suggestions." He compliments the jury on the great attention they have given to the case, and afterwards says to me—"They are business men, and there need be no fear of them." With regard to the order which he made reserving to himself the right to discharge the jury, I say that he had no jurisdiction to make it. If the Judge has not any inherent jurisdiction, he cannot give himself power by any reservation or order. And, furthermore, if there is any jurisdiction, he never acted upon it. If he had power to discharge the jury, he must have discharged them at the trial—and that must be before they have given their findings. Now, the Judge based his power to follow out the course that he has pursued on the further ground that, during the progress of the trial, he intimated to the parties that he had made the reservation. Five days after the trial had commenced, His Honour called me and my friend up to the Bench and intimated privately that he had made the reservation. On the thirty-eighth day of the trial he made a record of the reservation. On receiving the intimation I objected. The disagreement which was understood by counsel was the failure of the jury to find the material facts—either through the death of one of their number, or some other cause—which would enable the Judge to enter judgment. The Judge says: "The following questions of fact are submitted to the jury," and then follows a blank, presumably for the questions to be inserted afterwards. He then says: "The whole of the issues of the law and fact being hereby reserved for the Judge." His Honour continues (reading from the reservations), "At the further and final hearing of the case before me, and for the Full Court, and the Court of Appeal if necessary." Not only has the Judge a self-imposed jurisdiction, but he has undertaken to confer jurisdiction on this Court and on the Privy Council. Then, in the next part of the reservations, he reserves all questions of the admissibility or rejection of evidence, if necessary, for the Judge on the final hearing. That is one

of the functions of the Judge, and it is one of the functions that I contended he should have exercised before he allowed evidence to go to the jury. I refer to the evidence of Grimley, allowed before being connected with the other defendants. That evidence has never been so connected, and though I drew the Judge's attention to it when he was summing up, he said: "I will put the whole to the jury." The whole went to the jury regardless of whether it had been connected, or properly admitted or not. [CHUBB, J.: He was bound to rule on the admissibility of evidence if called upon, to preserve the rights of the objecting party.] Precisely. But there was no decision given as to admissibility. [COOPER, J.: It seems to me what the Judge meant in this case was that, although he had already decided the question of admissibility, or inadmissibility, still he reserved to himself afterwards the right to say whether he was right in doing so.] With reference to the action of His Honour The Chief Justice in ignoring the findings of the jury, and entering a verdict on findings of his own, counsel cited the case of *ex parte Morgan*, 2 Ch.D., 772, and *Evans v. Prothero*, 1 D.M. & G., 572. A further case quoted was that of *Fernie v. Young*, 1 E. & I. Ap., p. 63. All the way through the case His Honour The Chief Justice had arrogated to himself powers which the Court of Appeal did not possess; and, as showing that His Honour was not entirely ignorant of the power of Judge and jury, I refer to the case of *Elliott v. Gilchrist, Watt & Co.*, 3 Q.L.J., 93, in which His Honour distinctly laid down the principle that the jury were the judges of fact, and that their findings could not be departed from. That was exactly what the defendants contended in the present case. [WINDEYER, J.: The practice in New South Wales is that the verdict of a jury cannot be set aside unless it contains such findings as no reasonable men could arrive at.] Yes; but here the evidence was all one way. As to the question of the meaning of reservation, I refer to the case of *Fulton v. Andrew*, L.R. 7, H.L., p. 449. Further cases as to the inability of a Judge to set aside the findings of a jury, are *Armstrong v. Armstrong*, 2 M. & K., 45, *Browne v. Clintock*, 6 E. & I. Appeals, pp. 434-550. A Court cannot set aside the findings of a jury unless there was no evidence to support them. *A fortiori*, a single Judge had no power to do so. But in no case which had ever come before either an Equity Court, or a Court on the other side, had there been such a case as the present, and one where reservations had been made in blank. I further refer to *ex parte the Freeman of Sunderland*, 1 Drevry, pp. 184-191. [COOPER, J.: In a case of trial by Judge and jury, a jury is just as important a part of the tribunal as the Judge is.] In this case particularly so, because

there were so many questions of fact in which the opinions of business men were absolutely necessary—questions as to the security and sufficiency of the securities. Then there was also the question of negligence—one which few Judges would have liked to decide. Even if a Judge had had the power to try it alone, it was a case in which his discretion would have pointed the other way. The Chief Justice, too, had in his summing up recognised this, for he had repeatedly told the jury that he wished to have their opinion on the facts, or as many of them as they could agree upon. At one portion of the case His Honour had told them that he had not made up his mind on the case; but when did His Honour do so? But I will ask your Honours what the jury were in their places for? Were their answers, when they were brought in, to be treated as nothing? Such a course would be subversive of the fundamental principles which underlaid trial by jury, and bring the whole judicial system to nought. Was one Judge to be allowed to depart from the principle which the English, American, and colonial Judges had followed ever since trial by jury was established, and hold up the law unto himself? But that was the position; and His Honour asked them to quote authorities to show he had not got the power he took to himself. The jury, as their Honours would have seen, gave their answers after careful and grave deliberation; all admitted that, including His Honour himself. It was local knowledge which was required to enter into the case, and care was taken in selecting the jury, to get men who were acquainted with the local surroundings—men who would be likely to know the circumstances of the colony at the time in question, what would be the effect of a drought like that which occurred in 1886, and what would be the effect of *The Land Act of 1884* on the Darling Downs. The jury were selected for their qualifications as business men. Now, let us come to the question of expense. What had the learned Judge to do with that? What right had that to influence his conduct? What right had he to alter the whole law procedure of the colony in order to save money? Who were the persons to consider that matter? Who but the defendants? True, they were not in the position of the plaintiff company, who, they had been told, had a capital of a million and a-half with which to prosecute the appeals; on the contrary, the defendants were in the position of shareholders in the company, and would feel the knife whichever way it cut. Their Honours would remember that there would have been absolutely nothing to try if the amendments had not been allowed. I therefore submit that His Honour had no right to enter into such considerations, and that he should be silent on the point, as the whole of the extra expense had

arisen in connection with the amendments which were allowed by him. His Honour, in giving his decision, said: "The jury have not only not agreed on matters which seem to me to be proved, but they have given inconsistent and irreconcilable answers on the amendments." That brings me to the last ground of appeal. On this I will touch lightly, as I mainly rely on my previous contentions that the Judge had acted without authority. Even if the learned Judge had the power to ignore the findings of the jury, and enter findings himself, those findings, I contend, must be based on evidence properly received. But the contention on behalf of the defendants was, that evidence had been improperly received and improperly rejected. Of course, if the original findings of the jury stood, there would be no necessity to consider that matter; but if they did not, he would call their Honours' attention to the two points which he had just made. Now, with regard to the dummying, I submit that the findings of the Judge were against the evidence. There are two issues as to dummying. Was there any evidence of dummying, or did the defendants know of it? The Judge's findings were not properly receivable. If the Judge finds facts, he must do so on facts properly receivable. The Judge said he only used them as a step in the line of proof, and that they only affected Grimley at that time. I submit that that is not the true function of a Judge. He should decide before he sums up whether evidence is properly admissible, or not admissible. The learned Judge also improperly rejected evidence that was tendered by the defendants. The learned Judge allowed a general question to be asked, but refused to allow particular questions to be put. I submit we ought to have been allowed to get the evidence in an examination-in-chief, and, certainly, in cross-examination. When His Honour delivered judgment he reserved for further judgment the question of costs. The defendants, who had been the winners previous to His Honour's altering the findings, then found their position reversed. His Honour ordered them to pay the general costs of the action, and gave them only the costs of those issues on which they had succeeded. I submit that, if the Court reversed the judgment, they should get the whole of the costs of the trial, the whole of the costs of the interlocutory application, the whole of the costs of the commission, the costs of the demurrer, and the costs of that application in Chambers, in which they applied to have the amendments struck out as embarrassing. Even if we failed on the question of dummying, and your Honours do not reverse His Honour's judgment, we ought to get the whole of the costs before the amendment was allowed. The plaintiffs did not abandon the original case. The defendants suc-

ceeded on that, and all the subsequent proceedings were necessitated as much by that as by the dummying part of the case. In any event we are entitled to those costs. First of all, we say that, on the findings of the jury, we are entitled to judgment. Secondly, we say that the amendments that were introduced into the case should never have been allowed. We say, on that point, that the Court had a discretion, but that discretion must be exercised judicially. That these amendments that were allowed were embarrassing, irrelevant, and tending to delay the true trial of the action. I submit that it was wrong on every practice of the Courts to alter the findings of the jury and change them into something entirely opposite. In conclusion, I ask that the judgment which has been entered against us should be reversed and set aside as being wrong, based on an erroneous assumption of law and fact, contrary to reason, and repugnant to the righteous understanding of all honest men. I ask further, and claim that the verdict of the jury should be restored, and that judgment on the whole case should be entered for us on every ground.

Feez, on behalf of the defendant Grimley: I submit that I am entitled to judgment, and in support of that I can only rely on the argument which Mr. Lilley will produce. My friend, on the motion for judgment before The Chief Justice, asked that the securities, the agreements, and everything connected with the selection which was done in contravention of the Act were illegal, were absolutely void; and on that he claims to have judgment against the defendants other than the defendant whom I represent. I do not intend to argue the question myself, because I may say that it will be to my interest that the argument of my friend should be upheld. If my friend succeeds in proving the illegality of the transactions, then the covenants into which the defendant Grimley has entered cannot be enforced. [CHUBB, J.: If the securities are good, judgment for the account stands against you.] Yes; but if the securities are bad, the whole of the loans are tainted with illegality, and cannot be enforced. [WINDEYER, J.: That seems to be the whole case.] Grimley was kept at the trial to prejudice the jury against the other defendants. [CHUBB, J.: If you had left the Court after your offer, judgment would have gone against you, with 8 per cent. and costs.] During the trial it was found that £1000 of the amount claimed was paid off. His Honour reserved the question of costs, and I was forced to stay here. [CHUBB, J.: You were entitled to come in at the end of the trial, as the question of costs was material to you.] There would have been a surplus if the properties had not deteriorated and the titles been slandered. The jury found that the security was ample at the time of

the loans. Grimley, by his counsel, offered to submit to judgment for an account. The amendments were allowed against Grimley. [CHUBB, J.: You had the right to show the titles were good.] I am entitled to the full costs of the action. Interest at 9 per cent. was claimed, but the finding for 7 per cent. is in our favour. It is not stated on what basis the accounts are to be taken. After the Statement of Defence subsequent litigation against Grimley was unnecessary, and he should have his costs. *Fane v. Fane*, 13 Ch.D., 228.

Lilley: The case from beginning to end has been one of insufficient security. At the first part of the trial the case was one of insufficient value; when the amendments were allowed the question was one of doubtful title. Now, the question comes before the Court: Was there dummying? And if there was, what was the effect in law? Supposing the titles liable to forfeiture by the Crown, what was the effect of that on the security of the plaintiff company? Again, supposing they were not liable to forfeiture on the ground of dummying, was the whole agreement, the whole transaction as there raised, an illegal contract in law? Then, with respect to the mill lands, were the contracts contrary to *The Lands Act of 1876*? [CHUBB, J.: You say that, apart from dummying, the contract was illegal?] Yes; under the 21st section of *The Crown Lands Act of 1876*. The first thing to inquire into is the loans on the selections. It is necessary to thoroughly understand them. The first loan was 30s. an acre on those selections. There were sixteen selections. The question is whether these lands were dummied. In order to show that, it will be necessary to call attention to the evidence with respect to it. In 1881 the Darling Downs and Western Land Company was being formed, and Mr. G. L. Hart was consulted, and was connected with the formation of that company. Sometime during the negotiations, Sir T. M'Ilwraith and Sir J. P. Bell met together, and at one period of the interview Bell held up a piece of paper and said: "M'Ilwraith, what are we going to do about these selections?" Mr. Hart said that Bell wanted M'Ilwraith to include them in the purchase of Jimbour by the Darling Downs Company, and M'Ilwraith refused to have anything to do with them. That was in 1881. If these selections were *bond fide* how did Bell come to offer them for sale as a part of Jimbour? What right had he if they were the property of other persons to suggest to M'Ilwraith that they should be included in the sale of Jimbour? What did it point to but that he had control over the selectors, and could do what he liked with them? Then there was the evidence of Sir A. Palmer, who said that he knew that Sir J. P. Bell went on to advance money on

those selections to get them for himself. [WIND-EYER, J.: Does the Act do more than provide that the selector is not to enter into an agreement to make his land over? Are you not to lend him money to enable him to carry out the conditions? Where does it say that you cannot lend him money to enable him to carry out his *bond fide* occupation of the land?] You can lend him money, but not on the security of his land. I will read section 21. [WIND-EYER, J.: What contracts are these?] Contracts made with the selectors to lend money on the security of their land during conditional occupation. [WIND-EYER, J.: Is not the first part of the section—"No person shall, except by operation of law, become the holder of any land, or as a homestead," &c.—the dominant note of the section?] No. I submit that portion which refers to agreements made during the period of fulfilment of conditions. [WIND-EYER, J.: It does not prohibit anything more than that you must not lend money under an arrangement that you are to ultimately become the owner of the land.] I submit that it reads that any contracts or agreements made during the period of fulfilment of conditions by which the selector is to give security over his land—[WIND-EYER, J.: It does not say so. How does he violate the Act if he lends money to the selector who wants to live upon the land?] By taking security over it. [WIND-EYER, J.: It must be done with the intent to violate the law. CHUBB, J.: Is there any evidence that the original taking up of the land was in violation of the law?] No; it is not necessary. [CHUBB, J.: Is there any evidence that Childs and McFie dummied in the first instance?] No. Men do not publish their transactions on the housetop. You can only find out by inference from their actions. [CHUBB, J.: But you must not infer criminal intentions on evidence that can innocently be construed.] What other construction is it capable of, but that he went in to secure this land for himself, not for the selectors? [CHUBB, J.: Would that have the effect of violating the Act? WIND-EYER, J.: That is what I want to know. If a man, who is anxious to live on his land, lives upon it for nine years, and bad times come, and being still anxious to live upon it, cannot he go to a person and say "If you lend me £100 I will give you a mortgage over my land, if you will trust me, till I get my title?" No; because by that means the selector might lose his land. [WIND-EYER, J.: Does the Act say that a man shall not borrow?] Yes. Under section 21 you cannot borrow or give any security on the land while it is in process of conditional purchase. If you could the whole of Queensland might be dummied in that way. [CHUBB, J.: You must look at the policy of the Act. The policy of the Act was to require the selector to live upon

his land continuously for ten years.] And not be disturbed immediately afterwards. [CHUBB, J.: And there is nothing to prevent him when he gets the land selling it and making a profit out of it.] Precisely; but he cannot enter into any agreement during the period of selection and fulfilment of conditions. If he could not sell afterwards it would mean that no man would be able to alienate at all. [CHUBB, J.: You say he cannot do that before?] He cannot agree to sell or agree to mortgage, or do anything in respect of that land, before the certificate of fulfilment of conditions is granted. [WIND-EYER, J.: Is there anything in the Act which shows that that view is correct?] I say the 21st section does. [CHUBB, J.: Suppose he borrows money, or gets money, and after he gets his title he gives his security to the person from whom he obtained the money, can he set aside that deed?] If he gives it with the intention of violating the Act. [CHUBB, J.: Why? They would both be *in pari delicto*, and the other man would be in possession.] I can show you a case—the case of *Tooth v. Power*—where both the parties were *in pari delicto*. [WIND-EYER, J.: It was a distinct arrangement there from the first. One person took up land as dummy for the other.] The Privy Council decided in that case that the only way the land could be acquired was by fulfilment of the conditions prescribed, and while they were unfulfilled the right never left the Crown. [Byrnes, S.G.: That was the case of a child of six years of age, and they were asking to have the agreement enforced, the child being called a trustee.] I refer to the evidence of Grimley with reference to preliminary steps he took before he determined to secure the land for himself. Sir A. Palmer knew the reason why he applied to the plaintiff company to lend him money. He knew that the conditions had not been fulfilled, and that Grimley applied to the plaintiff company to help him to fulfil them. The evidence showed that what was not good enough for the executors of Sir J. P. Bell, was good enough for the plaintiff company to take up. My friend was mistaken when he said that I got Grimley's evidence out on the ground of credit. I certainly led Grimley, and put leading questions to him, and my friend, Mr. Feez, objected. The Judge said he came from the opposite camp, and might be led—might have leading questions put to him. I submit that he was quite right, and I did put them. There was no necessity for any declaration that he was a hostile witness. All you have to do is to ask leave to put leading questions. On that I will read *Taylor on Evidence*, p. 1178, and cite the case of *Clark v. Saffery, Ry. & W.*, p. 186. He was one of the defendants. [CHUBB, J.: It is not to be presumed that, because a person is a defendant, he can be called by plaintiff and im-

mediately cross-examined.] No; leave must be obtained first. [COOPER, J.: And the Judge must declare him to be a hostile witness.] I am not aware of that. [COOPER, J.: In my practice I have always understood that.] Grimley was not a willing witness, but he was not hostile. Very far from that; he was very fair considering the position that he occupied. [COOPER, J.: Exactly; all the more reason that he should not be cross-examined or led. CHUBB, J.: That does not make the evidence inadmissible.] No. [CHUBB, J.: It may be wrong in the Judge, but it does not make the evidence inadmissible.] No; it does not. In order to establish my case in respect to dummying, I had first to establish that there was dummying, and then to show that the defendants knew of it. [COOPER, J.: And you hold dummying to be money advanced by some person to enable selectors to carry through their selections?] Yes; and transfer it to the lender. [CHUBB, J.: Not to take up the land in the first instance?] Any man might change his position. He might commence perfectly *bond fide*, and afterwards enter into an agreement contrary to the provisions of the Act. [COOPER, J.: You mean by dummying—some person taking up land for some other person who advances him money to enable him to carry through the selections for him (the lender).] Yes; and when complete to transfer them to him. If that was not so, you could never have a case of dummying at all. Unless that is dummying, this Act is a dead letter. [WINDEYER, J.: I ask you is there anything in your Act which makes the *bond fide* lending of money to a conditional purchaser illegal, except in cases where the purpose and intention—I do not say express—is that the land is to become the property of the lender? Is it contrary to the Act to lend to the *bond fide* borrower who wishes to keep his land?] Yes; on the security of his land. [WINDEYER, J.: Where do you find that?] In the latter part of the 21st section. In this case the loans were really on the security of the land. It is not necessary to go so far. We have the wages and everything that took place. [WINDEYER, J.: The Victorian Supreme Court has decided the other way in the case of *Hayward v. Smith*.] I think our Act is stronger than theirs or the New South Wales Act. [WINDEYER, J.: I think not. Section 9 says: "And all contracts, agreements, and securities made, entered into, and given with the intent of violating, or which (if the same were valid) would have the effect of violating the provisions of this section, and all contracts and agreements relating to land hereafter conditionally purchased, made, or entered into before or after such purchase, and to take effect wholly or in part, at or after the completion of the conditions . . . shall be and are hereby declared to be illegal, and absolutely void, whether at law or in equity."]

Under the case I have mentioned, that did not prevent a *bond fide* mortgage.] Under our Act you cannot mortgage your land without the consent of the Minister—by section 32. [WINDEYER, J.: Does the section make the doing of this thing a criminal act?] It makes it illegal under section 21. [WINDEYER, J.: No; criminal.] I do not say criminal. Simply taking an illegal security is not a misdemeanour. [WINDEYER, J.: An attempt to commit a misdemeanour is a misdemeanour.] What is the meaning of section 32 then? It would have no meaning at all. You would be able to lend money without going to the Minister before the fulfillment of the conditions. The 32nd section would be inoperative if you could mortgage without the consent of the Minister. I submit that section 32, taken in conjunction with the 21st section, means that after the issue of the certificate you can mortgage with the consent of the Minister to secure a *bond fide* advance. [CHUBB, J.: What provision of the Act would be violated by this action?] Section 21. [WINDEYER, J.: That is not the question. It is a question of law as to what agreement is meant in that section. CHUBB, J.: How could the Act be violated? The policy was that land should be taken up and occupied, and that no person should hold more than a certain area fixed by statute. How would this agreement violate that provision?] Because it would enable Grimley, through the selectors, to secure the land for himself. It is not a case of a *bond fide* advance to a selector to fulfil his conditions and take a mortgage afterwards from the selector. That is not it. The facts here are these: Immediately after the fulfilment of conditions, and after the issue of the grant, they were all put into Grimley's name as fast as they could be. [CHUBB, J.: Look at section 27 of the Act. Under that the selector must make a declaration that he takes up the land for his own use, and not for some one else. You concede that that was done by the selectors?] Yes; all the formalities were complied with. [CHUBB, J.: Is there anything in the evidence of Grimley that shows that they were not taken up *bond fide* at first?] No. This was a case in which money was not lent directly, but through the Queensland National Bank, and after the selectors had acquired the freehold, they turned it over to Grimley. If it had been a case of a simple advance to a *bond fide* selector to enable him to acquire the land for himself, it would have been different. [CHUBB, J.: You say that the evidence of Grimley amounts to evidence of an agreement between him and the selectors to sell him the land?] To let him acquire it; he was the instrument. [CHUBB, J.: That means to sell it?] No. Grimley did not pay the value of the selections. He paid the selectors a wage. [CHUBB, J.: How do you know what Grimley got when he

got the titles?] We know that he got the loans, and we know that the selectors got 5s. an acre for their trouble. I say that the case of *Hayward v. Smith* is not a parallel case to this at all. [CHUBB, J.: You say that the loans were not *bona fide*?] Yes; as between Grimley and the selectors; they were mere puppets in his hands, as they were in those of Sir J. P. Bell. When he died his executors refused to have anything to do with selections of this sort. [CHUBB, J.: Then you draw the inference that the reason that they refused was that they had some suspicion of dummyming?] Yes. [CHUBB, J.: It is quite consistent with the fact that it was contrary to the provisions of Bell's will to lend money. WINDEYER, J.: Suppose the defendants' solicitors had taken the view that it was good law in Queensland?] Their solicitors never advised them that they could lend money on dummied land. They informed them that the mortgages were made out. [WINDEYER, J.: Their answer to that might be that they never advised them to lend on dummied land, but on Crown grants. The evidence that you read yesterday showed that the defendants did not advance until the securities were all in order.] That was that the deeds were all executed. In not one of defendants' solicitors' letters did they say that, although the lands had been dummied, they (the defendants) could advance money upon them. If the directors had known that there was something behind the Crown grants, they should have informed their solicitors. There was no doubt that the selectors were mere puppets in the hands of Grimley, and, as proving this, counsel read from the evidence given by the latter, in which he said he knew the selectors were getting £1 a week and rations for holding the selections. Promissory notes were given to the Bells for the advances which they made. [WINDEYER, J.: I wish to know whether you contend that section 21 of *The 1887 Land Act* can have any possible reference—in the latter part of the section I mean, referring to contracts—to contracts other than those of the selector himself?] Of course, your Honour. [WINDEYER, J.: We should like to hear you on the point now. It appears to us that this is one of the greatest elements in the case. Give us some authorities.] *Mercantile Bank v. Castle* (Victorian cases). The Victorian section of the Act is almost identical with the section of the Queensland Act. [WINDEYER, J.: The case is not identical with that which is before us at present. In the Victorian case there was a direct agreement with a licensee; in the present case the agreement was with Grimley, who dealt with the selectors.] He really had the selectors in his hands. [WINDEYER, J.: The Courts have decided against your contention in New South Wales. *Horsley v. Ramsey*, 10 N.S.W. L.R., 49. That decision was founded on the 9th

section of the Act of 1875, from which the Queensland section seems to have been taken.] In the present case the defendants must have known Grimley was selecting a larger quantity of land than he was entitled to. [COOPER, J.: Having established your principle, Mr. Lilley, I do not see how far you might not carry it. Suppose Grimley had borrowed the money from a friend, who had borrowed it from a company, they would all be liable according to you.] Yes; they would all be liable. Bringing more people into the matter does not make the operation any more legal. [CHUBB, J.: Grimley was acting as agent for the selectors.] No. They were acting as agents for him. I have to prove, first of all, that the defendants knew it. We say they did all along. [WINDEYER, J.: We may as well tell you, Mr. Lilley, that we are of opinion that the evidence shows that Grimley was manipulating the selections, through the selectors, for his own purposes, under agreements which could not be enforced under the law.] Then, I submit, that is evidence of dummyming. [WINDEYER, J.: Supposing that it was, the question is whether the company in advancing money to the Queensland National Bank were acting against the law. None of the evidence read by you yesterday showed that the defendants knew of these arrangements.] The Court has said that Grimley's action in respect of these lands is dummyming. I submit that the defendants knew he was by those means acquiring the selections. The evidence which I have pointed out shows that Grimley was drawing against the guarantee in the Queensland National Bank, and that, when he acquired the selections by means of drawing against the guarantee, he handed over the deeds to the plaintiff company, who replenished him with funds and took the mortgage. That shows knowledge on their part of dummyming. Look at the evidence of Sir Thomas M'Ilwraith himself. [WINDEYER, J.: You are making this assumption, Mr. Lilley—that Grimley and Bell and Sons are the same people. You point out evidence that Grimley was trying to get the selections for himself, and then you point out other evidence that the Bells were trying to get them for themselves, but you get no further. CHUBB, J.: You have not established any evidence of dummyming on the part of Sir Joshua Peter Bell. WINDEYER, J.: It all comes round to section 21, and to the one question—Can you prevent a man making any arrangement which will give the lands to himself?] Does not the evidence show that Grimley was committing a breach of the Act of 1876? [WINDEYER, J.: It is not what Grimley is doing with the selectors, but what the defendants are doing with Grimley.] The facts show that the defendants were advancing money for an illegal purpose. [WINDEYER, J.: Unless the Act distinctly says

the object is illegal and criminal, nothing that you can do can make it so. CHUBB, J.: Can you point out any evidence where Grimley told the defendants that he was wanting the money for the purpose you have said? Yes. Grimley himself said he told M'Ilwraith that he was getting the land by advancing money to the selectors. When he acquired the lands he mortgaged them to the company. Obviously the transaction was illegal all through. [CHUBB, J.: Where is the evidence that the defendants knew Grimley was paying the selectors £1 a week and rations?] It is not necessary to show all those subsidiary things. They did not need to know all these particulars. All they had to know was that the selectors were dummies for Grimley. [CHUBB, J.: Is there anything to prevent a selector fulfilling all the conditions, and at the end of the time handing over the lands to someone else?] The evidence here shows they were there for Grimley. [COOPER, J.: No; not for Grimley. But even then, why should that prevent the defendants advancing money? If they had got the lands, what was to prevent the defendants lending them the money?] Because they were lands illegally acquired under the Act of 1876, and the defendants knew it. [CHUBB, J.: How did they know that the Government had not waived their right to upset the title by the issue of the deed of grant?] That is for them to show. [COOPER, J.: No; it is for you to show. CHUBB, J.: You say the Crown were not aware of the whole of the facts?] That is for them to show. [CHUBB, J.: In other words, your contention is, that a man acquiring a title has to prove that it is genuine.] The grant was acquired contrary to the law of the land; it is shown by the evidence to be bad; and I say it is now for the defendants to say that it is good. [CHUBB, J.: The defendants never lent them a farthing until the titles were got.] That makes not the slightest difference. They knew the lands were illegally acquired, and that they could be forfeited at any time. [CHUBB, J.: Your position is this, is it not, that we are trying an action in which one of the parties—the Crown—is not present?] I submit it is not necessary that they should be present. This is not an action to set aside a deed. [CHUBB, J.: If your contention is that the Governor-in-Council could issue a proclamation to-morrow throwing the lands open to selection, it seems as if they should be a party to the action. Take this view. Under this judgment the deeds are void, and the Attorney-General may to-morrow institute proceedings to have them set aside on the ground that the Crown were deceived in issuing the grants. Now, supposing the judgment of this Court is that they have not been deceived, what would be the position then?] The position then would be that the grants would be good. [CHUBB, J.: Then

what would become of the judgment?] So far, the decision already is that the deeds are voidable. [Byrnes, S.G.: Not voidable, but absolutely worthless. Those are the words of The Chief Justice.] Voidable is sufficient for my argument. The defendants have taken as security land which they knew all along was acquired contrary to the provisions of the Act of 1876. I cite *Tooth v. Power*, 284, and *Howard v. Herrick*, 7 V.L.R., 79. Here it is clear that Grimley had acquired all the lands in contravention of the Act. I submit, on the authority of *Howard v. Herrick*, that any transaction, or agreement which will have the effect of violating the policy of the Act, would be illegal. I maintain that Grimley's transactions were of that nature, and that the defendants knew that they were advancing money on illegally acquired titles. The first mill loan was authorised while the land was in process of conditional selection. [WINDEYER, J.: That would be on the understanding "On your bringing us the title deeds, we will advance you so much money."] The Board minute states the money would be advanced on the completion of the freehold. That being so, the defendants must have known at that time that the land was in process of conditional selection. [WINDEYER, J.: What do you say to this case: Action for money lent. Defence, "You knew very well when I borrowed the money that I was going to make a bargain with a free selector to dummy some land for me." Would that be a good defence?] Yes, certainly; the agreement being illegal. [WINDEYER, J.: It is a bold proposition certainly.] Suppose a bank lent money to one of its customers knowing that he meant to use it for making an advance for illegal purposes? [WINDEYER, J.: The question is, is it for illegal purposes?] Most decidedly. [WINDEYER, J.: It is for a person to make the bargain with a free selector, but how far are you going to take it?] If you deal with a person knowing he is "dummying," surely that is dummying. If it is not, why have the Act enforced at all? A man cannot go to a bank and say "lend me money to 'dummy,'" and he cannot say "I have got another man 'dummying' for me, lend me money to pay him." It is illegal for a man to lend money to another to 'dummy' land under the Act of 1876. [WINDEYER, J.: Where is there evidence here that they intended to get the land for themselves?] They knew Grimley was going to get the land for himself. [WINDEYER, J.: But where is the evidence that they intended to get it for themselves? That is what the Legislature, it appears to me, intended to say?] All the selectors were doing was to get the land for Grimley; they never pretended that they were getting it for themselves, and the defendants knew that. [COOPER, J.: Grimley got money from the Queensland National

Bank, and the Queensland National Bank never pretended that they wanted the selections. And the defendants did not pretend that they wanted the selections for themselves? No; but if they knew the land was being dummied, and lent money to the person who was carrying out the dummieing, that would be an illegal thing. Here Grimley had men on the land, and the defendants lent money to him to enable him to employ other persons to dummy. If that was not dummieing, then the Act could be walked through altogether. What Grimley wanted the money for was to pay the Q. N. Bank. He carried on operations through the bank. He drew money out of the bank to pay to the selectors, and, having perfected the titles, came to the plaintiff company to get the money to repay the bank. [WINDEYER, J.: If Grimley borrowed the money from someone else to pay the plaintiff company, would that be illegal?] Yes. [WINDEYER, J.: How far is that to go on, Mr. Lilley? If it is so, who is safe under such circumstances?] Because the money filtered through the bank, that is no reason why it is removed from the category of illegal acts. He cannot do indirectly what he cannot do directly. The fact that the money went through the bank makes no difference. [CHUBB, J.: Were the majority of the loans granted by a full board, or if any of the members were absent, did the knowledge come to them soon afterwards?] Yes. [WINDEYER, J., to Solicitor-General: You make no point out of that. You stand or fall together? Byrnes, S.G.: That has been our position all through. CHUBB, J.: Evidence against one is evidence against all.] That is all very well; but the Court cannot do it. [CHUBB, J.: I think you had better read the evidence which shows knowledge on the part of each of the defendants. Do you contend that there is evidence of knowledge against Hart?] Yes; most decidedly. [CHUBB, J.: It is the weakest in his case, I believe.] He said he knew that the Bells had no legal claim to the money spent on the selections. [Byrnes, S.G.: He did not say that. He gave his opinion in the box.] In his evidence, Sir Thomas M'Ilwraith said, that before Sir Joshua Peter Bell's death, he knew that the selections were under his control. After Sir Joshua's death, Grimley wanted him to advance money to secure the selections for Bell and Sons. [CHUBB, J.: You contend that the knowledge acquired in 1881 was sufficient to put him on his guard and make inquiries in 1883 when the loans were applied for?] Yes; and the additional knowledge which had been acquired in the meantime. Does not that fact show personal knowledge on the part of Sir Thomas M'Ilwraith in 1881? Joshua Peter Bell died in December, 1881; that there is the application of Lady Thomas M'Ilwraith to secure the selec-

tions for her. The reply which he gave was that he did not want to have anything to do with the selections in any shape or form; but later on, Grimley comes on the scene, and the money is advanced to him to acquire the selections for himself. Sir Thomas M'Ilwraith, later on, said he thought the arrangements for getting the lands for the Bell family had broken down, and that Grimley was trying to get the lands for himself. Before the loans were advanced he knew that Grimley was going to acquire the lands through the selectors, and subsequently, when the lands were acquired, they were mortgaged to the plaintiff company. Obviously Sir Thomas knew there was an illegal transaction going on under the 1876 Land Act. As to the knowledge of defendant Hart of the illegal transactions, the evidence which he gave on the thirty-seventh day of the trial, he said he had acted in the formation of the Darling Downs and Western Land Company. [CHUBB, J.: What position do you take up with regard to the connection of the Queensland National Bank in the matter. Was it alleged that the defendants themselves had assured the bank that the loans would be granted?] The assurance was given by the defendants to the bank that the loans would be granted. [CHUBB, J.: Your case is that the bank would not have advanced the money in the first instance without a distinct understanding that they would get it back from the plaintiff company afterwards?] Yes. [CHUBB, J.: Where is the evidence of that?] There is the fact that no money was advanced by the bank until after the promise by the company. [CHUBB, J.: Even supposing that to be so, was it not on account of Grimley assuring the Queensland National Bank that the loans had been authorised? As a matter of fact the defendants had not authorised any loans at the time.] Oh yes, they had. They had passed a resolution in 1882; he went and got his deeds, and on their solicitors writing and telling them that the securities were all right, the cheque was paid. There was no further record made. Sometimes the conveyance showed that the defendants advanced more than had been paid on the selections. [CHUBB, J.: You contend as a matter of evidence that the assurance was made to the bank by the local directors?] They knew it. The chairman of the local board was on the directorate, and so was the general manager of the bank. The secretary of the board was also an officer of the bank. That is a fact, and that is how the money was advanced. [WINDEYER, J.: Your position is this: that Grimley went to the bank and asked for an advance on the assurance that someone would repay them if they advanced the money; then, that he went to the defendants and asked for a loan, offering them as security deeds which were

to be obtained; then, on the strength of that, the bank advanced the money. That is your case? And you also say that it is an illegal transaction, both as to the bank and to the defendants? Yes; because the defendants knew it, and knew it all along. They were aware of the illegal relations which existed. [Byrnes, S.G.: This is quite another new case!] No. It is what I have contended all the way along. There is nothing new at all. [WINDEYER, J.: If it is an illegal contract, how is it that you are suing Grimley?] The question as to an innocent purchaser does not come in. [CHUBB, J.: And the question as to acquiescence is another thing?] There is no evidence that the plaintiff company knew of these relations until 1887, when Mr. Littleton wrote home to the London board. [WINDEYER, J.: Then, if they are bound by the acts of their directors, why cannot they take the titles?] No validity of title, even by an innocent purchaser, is in order. [WINDEYER, J.: You go that length, do you?] Yes. [WINDEYER, J.: You disagree with The Chief Justice?] Yes; the question whether they are innocent purchasers or not is of no consequence. [COOPER, J.: You say that these Crown grants should be voided?] I say they are voided, or, at least, are voidable; and that the defendants knew, and failed to exercise reasonable care. His Honour's construction as to that, I presume, is based on section 101 of the Act, and on that I will cite the case of *Cumming v. Forrester*, 2 J. & W., p. 334. [CHUBB, J.: Am I to understand that the assurances were made by Grimley to the bank, or by the defendants to the bank?] I have already said that the chairman and general manager of the bank were members of the board of the plaintiff company. [CHUBB, J.: But an assurance is something said.] Their position in connection with the bank and the company shows knowledge, but it does not matter how they acquired the knowledge—whether Grimley told them or someone else. [CHUBB, J.: It does not appear whom Drury made inquiries of—probably his own officers.] Yes, but it does not matter; it is immaterial so long as the defendants knew the transactions that Grimley proposed to carry out. They knew that he got the money from the bank to carry those transactions out. [CHUBB, J.: Did you, in cross-examination, pointedly ask the defendants whether there was dummyming, or whether they understood that the lands had been dummied?] No. [CHUBB, J.: They gave you a reason and you took it?] I accepted it as the real reason. The executors of Sir J. P. Bell had no legal claim to recover the money they had advanced. If it had been perfectly *bond fide* then they would have had a claim. [CHUBB, J.: Then you ask us to infer that the reason was that they knew the land had been dummied, but you

did not ask the direct question in cross-examination.] You usually do not ask the question in that way. I now refer to the evidence of Sir A. Palmer, with the object of showing that he knew that the land had been dummied, and that the money was advanced to Grimley to enable him to acquire the land. On the question of the loans, I draw your attention to the circumstances under which the loan of £4,847 was granted. Grimley had not paid a penny interest for the previous six months, and he was practically insolvent. [WINDEYER, J.: They advanced that money in order to keep the bank from foreclosing?] Yes; and they gave a guarantee of £1,000 to the bank. Practically he was never allowed an account after that. That being so, I submit that the Judge was right in allowing the amendments. [WINDEYER, J.: Because he was insolvent the Judge was right in allowing the amendments?] No; because there was evidence of dummyming and knowledge on the part of the defendants. [COOPER, J.: You say that that being the position, the Judge was right in allowing the amendments on the thirty-eighth day?] Yes. I refer your Honours to *The Judicature Act* (Harding, Acts and Orders, p. 595, Order 27) "The Court or a Judge may, at any stage of the proceedings, allow either party to amend his statement of claim, or defence, or answer, or may order to be struck out, or amended, any matter in such statements respectively, which may be scandalous, or may tend to prejudice, embarrass, or delay the fair trial of the action; and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties." Now my contention is that the real question was the insufficiency of securities. [WINDEYER, J.: When did you ever intimate that that was the real question between you?] It was raised on the pleadings all along. [WINDEYER, J.: It was not raised on the pleadings. You went on for thirty-eight days without finding that the securities were insufficient. CHUBB, J.: You will have to show that you had not the means of making reasonable inquiry.] We did not know it. Not until Mr. Hart stepped out of the box did we know that there had been dummyming, and that the defendants knew it. Of course, if the Court is prepared to hold that you cannot make a case in cross-examination—[CHUBB, J.: The Court probably will not hold it. But that is not this case. On the thirty-eighth day you raise a new case on the fact that the titles were bad in point of law.] I could not do it before. I could not step in in the middle of their case and ask for leave to amend my claim. [COOPER, J.: Is it not a fact that you were prepared to overlook the question of dummyming at the commencement of the case?] No. [WINDEYER, J.: The real

question which you came to dispute in the first instance was insufficiency of security.] I opened the case that Bell had dummed land. It was not something thrown in to show recklessness. It was to show the interest the Bells had in the lands. The contention was that the defendants advanced £10,000 and £14,000 to Grimley to pay back what the Bells had advanced. [CHUBB, J.: There was no allegation of any impropriety on the part of the Bells at the time.] If I had known of the knowledge of the dummie, I would have opened straight away; but all I knew was that they had advanced money. I did not know that it was for an illegal purpose until afterwards. [Byrnes, S.G.: Look at Grimley's answers to the interrogatories.] There is no evidence there of dummie. [WINDEYER, J.: Look at the 13th and 14th paragraphs of the statement of claim. There are the allegations as to the Darling Downs Company and the defendants' connection with it. There was reference to dummie there.] If that is so, dummie was raised in the claim, and I am entitled to rely upon the evidence. I do not care which way it is taken. [WINDEYER, J.: Why, if you thought that, did you apply to amend your claim?] I did not think so. That is why I applied to alter it. In my opinion it was not made with sufficient particularity. I shall be very glad if the Court thinks it was raised. [WINDEYER, J.: I did not say it was raised. What I am pointing out to you is that you saw it and did not rely upon it.] No; I did not. It is an essential part of my case that I must prove dummie. Then I must prove that the defendants knew it. If I have not proved these two facts I have failed. [WINDEYER, J.: You say this is the strongest part of your case. Why did you not open it?] I did not know it until the defendants gave evidence in the witness-box. [WINDEYER, J.: Then the matter really did not enter into controversy between you when you came into Court?] I had thought that probably it would; but the matter came out in cross-examination. [WINDEYER, J.: If it was a matter of controversy between you then the Judge could make the amendments.] There was a very similar case tried before Mr. Justice Real last week, in which the matter which had to be tried was altered after all the evidence had been taken. [WINDEYER, J.: Your charge against the defendants is contained in the 18th and 24th paragraphs of your claim. There you say the lands were a grossly insufficient security; that the directors knew, or ought to have known, or with the exercise of reasonable care would have known. Further, that they did not verify the statements which Grimley had made as to the value of the lands. Did not that point to dummie?] Not necessarily. [CHUBB, J.: Then what does it point to? If you knew these facts on the 26th April,

1889, that was evidence, surely?] There was no charge made. [WINDEYER, J.: That is just what we say—that there was no charge made, although you had the facts. Your case was that the security was insufficient. That was what they came to Court on. CHUBB, J.: Did you not argue yesterday that they knowingly advanced money to Grimley for the purpose of enabling him to get the lands? Is that not dummie?] No; it was purchasing. [WINDEYER, J.: It was purchasing before the conditions had been fulfilled.] No; I did not say that. [WINDEYER, J.: In your 13th paragraph of the statement of claim you say that the defendants advanced to Grimley the sum of 10s. per acre on the selections for the purpose of making the necessary improvements.] That may have been a *bond fide* advance. Until we got the defendants in the box we did not know they were engaged in any illegal transaction. [WINDEYER, J.: You argued yesterday that a common-sense view of the matter should have told the defendants what was the position. You had the whole of the facts before you; you had the same information. COOPER, J.: I notice in your opening, Mr. Lilley, that you refer to dummie. You say it was resorted to by the Bells to secure the lands.] At that time I did not know the defendants knew it. [COOPER, J.: It is quite evident to me that if you did not charge them with dummie, you suspected it.] Yes; but not that the defendants were aware of it. It is essential to my case that there was dummie, and that they knew it. [CHUBB, J.: The question is whether the pleadings as originally drawn were not so artfully worded as to point to dummie without charging it. WINDEYER, J.: It is not the case he opened. That is not what they came here to answer. COOPER, J.: You say you knew nothing about dummie?] No; not until Littleton wrote home. As soon as the London directors heard of it they sent a man out at once to make inquiries. [CHUBB, J.: You could have found out all the circumstances before the statement was drawn. COOPER, J.: Littleton's letter distinctly points to dummie. Why didn't you raise it?] The letter was a private one written to the London board. [CHUBB, J.: The information was got here, and you could have got it if you had liked. COOPER, J.: If you read Mr. Littleton's letter to London, under date of 20th January, 1887, you will see that he says the history of the transactions was simple. When the Darling Downs and Western Land Company, Limited, took over Jimbour there were many dummed selections. Sir Thomas M'Ilwraith, as manager of the Darling Downs and Western Land Company, Limited, would have nothing to do with them, but Grimley, who had long been in the employment of Bell and Sons, undertook to do

what was necessary to get rid of the dummies. There was, says Mr. Littleton, no harm in this. Bell and Sons would doubtless have handed over the selections to the Darling Downs and Western Land Company. Sir Thomas M'Ilwraith must have been aware of that? There was nothing to show that he was. [COOPER, J.: If that information was wrong, it was the information that he doubtless conveyed to the plaintiff company. There is a distinct intimation conveyed to the chairman of the London board by Mr. Littleton.] All we could find out by searching at the Lands Office was that the land had apparently been taken up *bond fide*. We had no evidence to prove that Sir Thomas M'Ilwraith knew anything to the contrary. [Byrnes, S.G.: Mr. Littleton further says—"It is a great pity that one of our directors should have been mixed up in a transaction of this nature, but I may say he has been perfectly candid about it, and the transaction would have been perfectly satisfactory if the value of the Darling Downs land had been maintained."] It does not say that he told Mr. Littleton that he knew there was dummying. [CHUBB, J.: You say there is nothing in paragraphs 13 and 14 of the statement of claim pointing to dummying? And you opened dummying to the jury?] Yes. To show an improper interest in making the advances, which were made for improper purposes—for the benefit of Bell and Sons, and not for that of the plaintiff company, and without taking any security from the persons for whose benefit the money was advanced. [CHUBB, J.: It was not a question, then, of taking no security at that time, but insufficient security.] Yes. It was a question of not taking a security from the persons for whose benefit the money was borrowed. [CHUBB, J.: You should have alleged that the defendants never took any security from Bell and Sons.] We have done that in paragraph 18. [COOPER, J.: You contend that although you suspected that the defendants knew all about the dummying at the beginning, yet you had not evidence before you which would support such a case, and you kept that part of the case back until you had drawn from the defendants sufficient evidence to affect them.] No; I do not say anything of the sort. I say that the plaintiff company knew that the land had been dummied, but did not know that the defendants knew anything about it. [COOPER, J.: They must have suspected, because Mr. Littleton distinctly pointed it out in his letter.] Even supposing that we had suspected, we could not make that case until we had evidence. [COOPER, J.: That is precisely what I am saying. Is it not a fact that you suspected them all along, but were unable to prove it?] Certainly. [COOPER, J.: I really do not see how you can support the conduct of the case in any other way.] You do not

apply for an amendment until you have reasonable hope of making your case. [COOPER, J.: Is it a fact that you delayed this part of your case until you had drawn out evidence?] Yes. When it was elicited I saw that I had another string to my bow, and I applied for the amendment. Under what other circumstances could I ask? I had first to get my evidence to support my case. [COOPER, J.: I think your proper plan would have been to have made the charge of dummying originally, and then to have called the defendants and cross-examined them.] No one after the decision in *Simpson's case* would have thought of interrogating them. They would have declined to answer, on the plea that their answers might tend to criminate them. On the question of amendments, I will refer your Honours to the cases of *Tildesley v. Harper*, 10 Ch. D., 392, and *Kurtz v. Spence*, 36 Ch. D., p. 770. [COOPER, J.: You cannot get an amendment which will make an entirely new case.] There is the case of *Riding v. Hawkins*, 14 P. D., p. 56. In our case we had all the evidence that could be got, and if there was anything in it, it should have been disposed of at once. [CHUBB, J.: The real question in controversy on the amendments is whether the titles were good or not.] The real controversy all through was whether there was sufficient security or not. [CHUBB, J.: The question is whether, after reasonable inquiry, you ought not to have known it when you came into Court.] COOPER, J.: Had you succeeded on the first part of the case you would not have tried to bring this on? Yes; I would. [COOPER, J.: Is it not quite true that on the first part of the case you absolutely failed?] No. We were still entitled to recover on the mill loan. I do not admit that we failed; I say the jury were wrong. [CHUBB, J.: You say that there was no injustice done to the other side by the granting of the amendments?] My contention was that it was not a fresh case. It was the same case—the insufficiency of security. First we went on the insufficient value, and then on the insufficient title. On that I will refer your Honours to the case of *Sheikle v. Lawrence*, 2 Times Reports, p. 777. [CHUBB, J.: Assuming that the Judge had power to make these amendments, the defendants would have been entitled, if necessary, to get evidence in England?] The Judge certainly gave them leave to get it. [WINDEYER, J.: Do you think it would be reasonable that a case which had gone on for forty days to be stopped, and a commission sent to England which would delay it for six months? Why could not you have asked the defendants on interrogatories?] Because they would have said that it would tend to criminate them. I would not do a useless thing; besides, I had no reason to suspect them. [WINDEYER, J.: You argue in point of fact that you could not in-

terrogate them on dummying because it would be a criminal offence? Yes. [WINDEYER, J.: So to make all these contracts would be a criminal offence? Yes; if they knew it; and they would not be bound to answer. [WINDEYER, J.: They did not believe for one moment that it was a criminal offence.] There is also the case of *A.S.N. Company v. W. Howard Smith*, 14 Ap. Ca., p. 318. [WINDEYER, J.: That was a very unsatisfactory case. It was all wrong in my opinion.] It is binding on the Court until it is set aside by the Privy Council. [WINDEYER, J.: It is not binding on this Court. CHUBB, J.: Do you say that no injustice has been done here to the defendants? I say that more injustice would have been done if we had not been allowed to raise the question, seeing that it was elicited when the defendants went into the box, that they had advanced money on no security whatever. It would be highly inconvenient to have had to bring another action. Besides it is the principle of *The Judicature Act*, if possible, to dispose of all the matters involved, in one action. [CHUBB, J.: But not at unlimited cost to the parties.] It was their evidence that clinched it; it was not our evidence that proved it; it was the evidence of the defendants. [CHUBB, J.: But they might have got volumes of evidence of acquiescence if they had tried.] They did not suggest it. They simply said that it would be an expensive thing to go to England. [Byrnes, S.G.: Oh, no. We might have examined Sir James Garrick and found out what he thought when he read the letter, and whether he thought that the title was good or bad.] I refer to the case of *Budding v. Murdoch*, 1 Ch. Div., p. 42, as dealing with the right to make amendments, or to make a new case at a trial. Now, I will proceed to deal with what took place in Chambers on the application to strike out the amendments. [CHUBB, J.: Before you go into that I should prefer that you would deal with the question as to whether this was a material amendment, and also as to whether the Crown should not have been here. You will have to show that your amendment was a good one without the Crown.] Of course, I have already submitted that the amendments were material, and that the presence of the Crown was not necessary. This was not an action to set aside a Crown grant. We say the deeds are voidable; your Honours have said they are void; but we do not ask that they shall be declared void. [CHUBB, J.: Is not the effect of the judgment that they are not in existence?] That question does not come up. We do not ask you to cancel the deeds. [CHUBB, J.: Then the deeds may remain good, and yet the defendants may be liable to pay the whole of the value of the lands.] The whole of the lands may be forfeited. They are liable to that at the present time. [CHUBB, J.: In an action for breach of

covenant or forfeiture, the lease is not bad until forfeiture is acted on.] Certainly. [CHUBB, J.: There is the question of waiver to be considered.] That is for them to show. We say the defendants were guilty of negligence in advancing on titles which may be voided, and there is evidence that they are liable to forfeiture. *Allcock v. Pain*, 2 Moore and Pain, p. 625. [CHUBB, J.: Is not your position this—that the titles are absolutely as good as any others until the Crown steps in and say they are void?] Possibly. [CHUBB, J.: Then you are not too soon?] Why should we have such a title forced on us? [COOPER, J.: If you get judgment, how would you proceed to realise? What form would it take?] They would pay us the money, and take back the securities for what they are worth. The Chief Justice said the titles were worthless; but they are not actually so until the Crown acts. There is no order taken out from the Court annulling the deeds. [CHUBB, J.: They have been declared to be void.] But they will not be so until the Crown takes action. I submit that there is no necessity for the Attorney-General to be here. [CHUBB, J.: I think it is incumbent upon you to show all the circumstances surrounding the lease. That is why the Attorney-General should be here. Supposing, for instance, the Crown have received a year's rent, they have waived their rights.] No. [CHUBB, J.: It has been held so.] That is for the defendants to show. The onus is upon them. Now, I will come to the £1,000 loan. I shall submit that the jury having disagreed, the learned Judge in his judgment gave us judgment for £1,000, and that gave us right to the costs of the action. As to the advance of £1,000, the Judge has found in his answers to the questions, that the money was advanced without any increase of security, that it was carelessly and negligently made, and without reasonable care. [WINDEYER, J.: The jury found the opposite. I suppose the contention was that the lands and the buildings were sufficient to cover all advances.] I will refer your Honours to Grimley's own evidence with regard to the matter. [WINDEYER, J.: It was conceded the other day that there was evidence on which the jury could find that the securities were sufficient. *Byrnes, S.G.*: There is the further point, your Honour, that the £1,000 went to pay wages. CHUBB, J.: And the mortgagees would have been liable for six months' wages under *The Insolvency Act*. I suppose it is contended that there was evidence sufficient to warrant the Judge in setting aside the findings of the jury, and to say that the security was insufficient.] Certainly. [CHUBB, J.: Then it will be your duty to point it out, Mr. Lilley.] I refer to the letter written by Grimley to the company at the time of the loan, in which he pointed out that he had been unable to make

it a profitable concern, and that unless further assistance were given, he would have to call a meeting of his creditors. Sir T. M'Ilwraith, in his evidence, said the advance of £1,000 was to pay wages, but he did not say how much there was due. [CHUBB, J.: Did you call any business men to show the surrounding circumstances?] No; it was not necessary. The facts were too plain—the man was hopelessly insolvent. [Byrnes, S.G.: All the other creditors gave him six months.] You not only gave him £1,000, but time as well; and the result was that everyone else was paid off in full, and we were the only ones who were let in. [WINDEYER, J.: If the securities were good, and had been sold, this extra £1,000 would have made no difference.] They could not be sold. They had been advertised. Sir Thomas M'Ilwraith, in his evidence, said he had spent over £700 in advertising in Melbourne and New South Wales, and a special commissioner was sent down to endeavour to get them sold, but it was no use. This was before the application for the loan was made. The whole circumstances showed that the loan simply went to increase the debt; and the result was that everyone got paid in full except us. Now I come to the discharge of the jury. They disagreed, and were discharged; they did not find on the amendments. Some of them evidently thought there was evidence on one side, and some on another. The questions on which they disagreed were 11A, 11B, 11C, and 11D. It was on question 11H that I submitted that I was entitled to judgment against the defendant Hart. I did not ask for judgment against Hart before then. I do not mean to infer that I did not ask for judgment against him at all. I said that, on the findings, I was entitled to judgment against all the defendants except Hart. The jury disagreed on the most material questions. [CHUBB, J.: On the question of knowledge.] On the question of dummying. [Byrnes, S.G.: They did not agree on the question of knowledge; they answered the questions bearing upon it.] They did not answer them. [Byrnes, S.G.: They answered the questions of knowledge that they disagreed as to whether the facts existed. WINDEYER, J.: It is explained in their explanation. They say that where no answer is given, they did not think it necessary to give any.] Exactly; because if they did not answer the questions as to dummying, it was not necessary for them to answer as to knowledge. How could the jury have answered the questions of knowledge when they disagreed as to whether the circumstances existed. [WINDEYER, J.: Where do they say that they cannot agree as to dummying?] In question 11A, which they mark "not agreed." [WINDEYER, J.: They were discharged *ab initio* as far as I can see.] They were discharged because they disagreed.

That is His Honour's note. Why should His Honour mention that they disagreed if they were discharged in the ordinary way after having finished their work? [CHUBB, J.: Suppose a jury agrees on nineteen questions out of twenty which are put to them, can the Judge discharge them because they do not agree on that one?] Yes; if that is the most important question. [CHUBB, J.: Here you had a case split up into two parts. In one part the jury agreed, and on the other they disagreed; ought not the Judge to have entered up judgment on the case that they agreed upon, and kept the other back for a new trial?] No; I submit that he should have discharged the jury, because they disagreed upon the material part of the case. [WINDEYER, J.: He says, "They disagreed, and I discharge them," but he never intimated that to the parties before the Court.] It was apparent. The Judge said, "Have you agreed, or shall I put 'not agreed?'" They went back and they put "not agreed" against the question involved. [WINDEYER, J.: It is a question whether the state of things had arisen which would justify the Judge in saying, "I will try the action myself."] I submit that he was justified. The jury disagreed, and it was open for the Judge to decide the matter himself. [WINDEYER, J.: What authority have you for that? That is the question.] On the 16th October, 1891, His Honour made his order for the trial of the action with a jury, and reserved to himself the right, if the case got beyond the jury, to take it out of their hands at any time he might think fit, and decide it himself. [CHUBB, J.: Grimley claimed no jury?] I am not clear about that. I do not think that he did. The Judge ordered the trial, reserving leave to himself to withdraw the case from the jury at any time he should think fit, on it appearing that it was getting beyond them. It was pointed out to His Honour before that, that the case would probably be a very long one, would be very expensive, would involve the consideration of a lot of papers and documents, that it was a matter which might involve mixed questions of law and fact, and that altogether it was an improper case to go to a jury. Numbers of cases were quoted to show that there had never been an instance in which a case of the kind had been tried by a jury before. His Honour intimated that he was not going over this matter again a second time. [CHUBB, J.: Apparently it would not get beyond the jury until they returned into Court with their findings.] I understood that there was to be no second going over the matter. [WINDEYER, J.: I suppose that is admitted. The question now is whether he had the power to do what he did.] Certainly he had, under Rule 28. He certainly had power to order the trial by a jury. This being a case which he could have tried

by himself without the consent of the parties, he had the right to try it by a jury, and had the right, even after ordering the trial by a jury, on application being made to him, to dispense with the jury and try it himself. [WINDEYER, J.: At what stage after? He might at the commencement of the case, on hearing the opening statement, say: "I am of opinion that it is necessary to take the case myself," and that might be argued; but where do you find authority, after the case has gone on for over forty days, to dispense with the jury and go on on the evidence that they have heard?] My contention is that he had the right to order the action to be tried by a jury, first of all. [CHUBB, J.: Your first step is to show that this was an action which, before *The Judicature Act*, would have been tried by a Judge alone.] That is what I am going to do. My contention is, that before *The Judicature Act*, he could have tried this action by himself. I submit that after ordering the trial to be by a jury, he could, on application being made to him, have dispensed with the jury. [CHUBB, J.: You say he could have rescinded his first order?] I submit he could equally reserve his right to try the case himself. [CHUBB, J.: If he could have rescinded his own order, could any other Judge have rescinded the order for the trial by a jury?] Most decidedly. Any other Judge could have done it. [CHUBB, J.: Supposing this action had been set down for trial on circuit at Rockhampton, could the Judge on circuit, when it came before him, say, "I will try it without a jury; I will rescind this order of The Chief Justice?"] If it was set for trial before him, certainly. Suppose there is what would have been an equity suit before the passing of *The Judicature Act*? Suppose the Judge in Chambers should order it to be tried, knowing thoroughly all the circumstances, before the Circuit Judge at the Rockhampton sittings? If, when the other Judge gets there, he finds it is an equity suit, cannot he rescind the order and say, "I will try the facts and will reserve the final question to be decided by the Full Court in Brisbane?" He could clearly do that. He could make an order for the trial by a jury. If the jury disagreed he could then say, "This is a case I won't have tried by a jury again; I will try it myself." Is he then to go over the long and expensive evidence again in order to get the same material to give his judgment upon? [CHUBB, J.: Can a Judge rescind his own order after it has been drawn up?] Of course he can. With respect to a Judge rescinding his own order, the Chamber practice is this:—After you go to a Judge, and he makes an order in Chambers, if you disagree with that order you ask him if he will re-hear you before you appeal to the Full Court. He then intimates whether he would

like to reconsider the matter. If he states that he would, he hears both sides, and rescinds or corrects the order as he likes. [WINDEYER, J.: Do you seriously contend that after a Judge has heard a matter argued by both sides he can rescind his own order?] I submit that he can. [WINDEYER, J.: I should like to hear some authority for that being the practice in Queensland. It is quite new to me. If a Judge makes an *ex parte* order he may afterwards hear the other side, and then, if he likes, rescind his order.] In this case, I say His Honour is not rescinding his order. He is merely acting upon it. It is the practice in Chambers. [WINDEYER, J.: Their Honours tell me they know of no such practice. I have never known of any such practice during the thirty years of my experience.] There is the case of *O'Brien v. O'Brien*, and other Chamber matters not reported. In that case an application was made before his Honour Mr. Justice Harding for a writ of attachment. Both parties appeared, and after hearing them his Honour made an order on 9th June, 1889, dismissing the application, with costs. On 26th June his Honour, in consequence of something that had been pointed out in the meantime, granted a writ of attachment. [CHUBB, J.: Was the first order taken out before the second order was taken out?] I am not certain about that. [CHUBB, J.: I have asked his Honour Mr. Justice Harding this morning what is his practice, and he told me that so long as the order is not taken out you can go back to him, but the moment it is taken out you must go to the Appeal Court.] I did not know that. There is also the case of *Siemen v. Jehn*. That was a case in which I appealed from the late Mr. Justice Mein to the Full Court, and I was asked if I had given the Judge the opportunity of reconsidering his decision, and I had not. There is also the case of *Cohen v. Bonny*. [CHUBB, J.: You must remember that the orders here are part of the Act; in England they are regulations. Order 40, r. 1a, deals with the matter. I will point out that that order differs from the English order, because in the English order the words "on summons" are added. We have not got that, but no doubt it has been the practice here to allow motions to be made on summons, so that if this order is to be strictly construed you would have to apply on motion to a Judge, and that clearly would not be in chambers.] You go to the Judge, and he hears it in chambers as in court. [CHUBB, J.: Another Order is 58, rule 2. *Byrnes, S.G.*: There is a case—*Russell v. Taylor*—in which Mr. Justice Harding decided that he had not the power to rescind his own order. It was a case of final judgment, and the defendant afterwards came in and asked to have leave to defend. It is reported in the *Courier* of

7th January, 1887.] The practice I was following is mentioned in 21 Ch. Div., *Anderson v. Butler*. Yes. I was mistaken in the practice as to whether the order was taken out or not. I was, before referring to this question, on the question of the reservations, and I had submitted that the jury had disagreed on a material point, and that the Judge had the jurisdiction to make the order that he made during the trial. [CHUBB, J.: I do not want to stop you, Mr. Lilley, but bear in mind this—you say you are entitled to have the case tried without a jury on the footing that the action was an equity suit. Now, before *The Judicature Act* it was clear that trial by a jury, unless by the consent of counsel on both sides, could not be directed until the case had been heard. So that according to the old practice you were not entitled to the order for the jury until the case came on for hearing.] This is regulated by *The Judicature Act*, Order 35, Rule 28. I submit that before *The Judicature Act* this was an action which would have been tried by a Judge without a jury. I have been unable to find any instance before *The Judicature Act* where directors have been charged with misfeasance and the action tried in a court of law, and I submit that the reason for that is this. The directors were until very recently regarded as being in the position more or less of quasi trustees, and their misfeasance was looked upon in the light of a breach of trust. On this point I will cite the cases of the *Leeds Estate Company v. Shepherd*, 36 Ch. Div., p. 787; the *Sheffield and South Yorkshire Building Society v. Aislewood*, 44 Ch. Div., p. 412. I submit that this was a case which would formerly have been tried as an equity suit, for the reason that it was regarded until very recently as one for breach of trust. An application was made to his Honour under order 35, rule 28, and his Honour thereon directed that the issues of fact should be tried by a jury. [CHUBB, J.: Is not the form of the order that the whole action is to be tried by a jury?] I submit that is the only order that he could have made. [CHUBB, J.: It plainly means that the action was to be tried by the court and the issues of fact may be taken by the jury. At common law you do not make an order for the trial by a jury because actions are tried before juries.] I submit his Honour's order means that the issues of fact are to be tried by a jury. [CHUBB, J.: You gave notice for trial by a Judge. They demanded that the issues should be tried by the jury.] His Honour reserved the right to say whether the jury were right and the right of this court to correct the jury afterwards. During the progress of the case the action from one of misfeasance became one of fraud. I submit that, being an action of fraud, it was still within the cognisance of the Judge, and would have still been on the equity

side. [CHUBB, J.: What you have to consider is not what happened afterwards, but the grounds on which he was justified in making reservations. You are bringing in something which took place thirty-eight days after the trial commenced.] No, I was saying something which happened afterwards that changed the powers of the Judge. If it became a matter which should not have been tried by a Judge without a jury, then that might have affected the Judge in making the order and in discharging the jury and trying the case when he did try it. [CHUBB, J.: Does not your argument amount to this—that something which happened afterwards justified the Judge in the original course which he took?] No; but rather this—that nothing which happened afterwards could have made his action wrong. You see the action changed. It was first misfeasance, which would undoubtedly have been tried before a Judge without a jury. It afterwards became an action for fraud, and I submit still remained within the cognisance of the Judge without a jury. [Byrnes, S.G.: The original writ says misfeasance. CHUBB, J.: And wrong doing. Byrnes, S.G.: In that they did not advance *bona fide* for the interests of the plaintiff company. CHUBB, J.: That you were good to your friends.] That they did not entirely consider the interests of the plaintiff company. [CHUBB, J.: Nothing that happened after the order could alter the character of the suit so far as his jurisdiction to try the action himself.] Yes. I will mention the cases of *Back v. Hay*, 5 Ch. Div., p. 235; *Pilley v. Bailes*, 5 Ch. Div., p. 4; and *Rustin v. Tobin*. I submit that his Honour had the right to order the case to be tried without a jury. It was competent for him to order it to be tried in that way or with a jury. After he had exercised his discretion in that respect, and ordered it to be tried by a jury, if he found it was a matter unsuited for the jury, or if the jury disagreed, he had the right to order it to be tried by a Judge alone. [CHUBB, J.: That is if it was approved by the parties.] If that contention were good there would be trial after trial by jury until they had agreed, and there might be no finality. Could not the Judge say under such circumstances that the litigation would be oppressive, and that in order to prevent it he would hear the case himself? *Burgoyne v. Meredoubt*, 8 Pr. Div., p. 401. [CHUBB, J.: I do not want to interrupt your argument, but you said just now that a Judge having ordered a trial by jury could afterwards order it to be tried without. Looking at rule 29, order 38, it is there provided that such an order must be made before the trial or when the trial commences.] That is with a jury. This is the converse thing. The principle does not affect this case. I submit that after a case has been tried by a jury it can be tried by a Judge

but after the Judge had tried it he would not send it down to be tried by a jury. The case cited is a case in point [CHUBB, J.: Was this case cited at the trial?] No. The argument is this for the other side—that the case having gone to a jury cannot be taken away again. That the jury must either agree, or else that the case must be tried over and over again. I say the Judge would have the right to try the case by jury, but if the jury could not agree he could, on a special motion by either party, order it to be tried by himself. [CHUBB, J.: It would have been quite right for the Judge to exercise his power if he had done so in a proper manner.] I submit it was exercised in a proper manner, because it was to prevent the case being tried twice over. The Judge wished to prevent the possibility of going over the ground twice. The only difference was that he made one order instead of two. [CHUBB, J.: The Judge made the order after he had tried the case.] No. [CHUBB, J.: Your point is that he made the order before the jury disagreed?] Yes; the order was that if the circumstances arose he would try the case himself. Taking into consideration the balance of convenience and the question of expense, I submit that the order was a right one. It raised the whole question on which to appeal to this court. [CHUBB, J.: In point of fact you say that the Judge has tried the case?] I submit he has. [CHUBB, J.: Which means this—that when a trial by jury is taking place the Judge can try it in anticipation? He can try it at the same time as the jury are trying it?] Yes. [WINDEYER, J.: Would it be a seemly thing in the administration of justice to have two sets of findings at the same time on one case—the Judge to come in with his findings and the jury with theirs? COOPER, J.: Suppose at the end of this abortive trial—as it is contended it is—the Judge had ordered the new trial to be before a Judge without a jury. Would it have necessarily been before himself?] Under these particular circumstances it would. None of the other Judges of the Southern Division would have tried it. [CHUBB, J.: Then if the jury had disagreed, could not the Judge have said to both sides, “I mean to act on my reservation, and I will try the matter without a jury—I will sit to-morrow morning and hear what you have to say”?] I submit that is what he did. [WINDEYER, J.: The question is how was he to act upon the reservation?] His Honour heard a motion for judgment on the material which had been taken before. If he had said, “This is a different proceeding altogether, and I intend to use the notes of the old proceedings,” there might have been some objection to it. His reservation was that he could take the whole matter. [CHUBB, J.: On the motion for judgment the counsel for the defendants did not know whether he was acting on the findings of the jury

or the findings of his own mind.] He said he would hear the parties on all the facts. I asked him to give the judgment on the reservations. The jury did not answer important questions at the trial. That was why the Judge would have been within his rights in ignoring their findings. [CHUBB, J.: But when you moved for judgment you did not ask the Judge to sweep away the findings of the jury altogether. You said certain questions had been wrongly answered, and others left unanswered. Those which were not answered you asked his Honour to answer, and those which were answered against you you asked him to reverse. What you asked for was for judgment, partly on the findings of the jury, and partly on the findings of the judge.] I said part of the findings of the jury were wrong, and should be reversed. The other findings were immaterial; they could only be answered in one particular way. On the question of acquiescence, I refer to *Ashbury v. Watson*, 30 Ch. Div., pp. 377-381. [CHUBB, J.: Acquiescence is summed up in one sentence—“Conduct, with knowledge of all the circumstances.”] *Busch v. Alt*, 8 Ch. Div., pp. 286-312; and *Vivian v. Vivian*, 30 Beav., 68. As to the question of costs, the plaintiffs having succeeded in gaining a verdict for £1000 in the original suit, his Honour was justified in giving them the entire costs of the action. A number of issues we failed on, and we were ordered to pay the costs. If the court reverses those findings, I submit it will reverse that part of the order. As to our costs, I submit the judgment should stand. [CHUBB, J.: And you contend that after the amendments you were entitled to have the costs of the action?] Yes. The evidence which was taken both with regard to dummyming and acquiescence was still necessary evidence. [CHUBB, J.: Didn't the bulk of the evidence go in against Grimley?] Oh, no. [CHUBB, J.: Not up to the date of the amendments?] No. It was evidence showing that Bell and Sons had advanced £10,000 on the selections, and it was alleged in the thirteenth paragraph of the statement of claim that the company advanced the money in order that Bell and Sons might be repaid. That was a part of the original case. It was necessary, not only to the original case, but to the amended case. [WINDEYER, J.: You, in point of fact, say that they advanced £10,000, not for the benefit of Grimley, but for the benefit of Bell and Sons, to whom Grimley gave back the money they had advanced?] Yes. Therefore I submit that all the evidence which was afterwards used on the question of dummyming was essential to that. As to the proper form of judgment, I submit that the judgment of the Chief Justice was right—that the order should be to transfer the securities to the plaintiffs on being paid. *Fry v. Absalom*, 28 Ch.

Div., p. 268. With respect to the defendant Grimley, I object to his Honour's order as to the reduction of the rate of interest. They were not *in pari delicto* as to Grimley. Years had expired between the loans and the raising of the question of illegality. There was no knowledge of any illegality until 1887; and not complete knowledge until the trial. *Reynell v. Spry*, 21 L.J., Ch., p. 633 [Feez: I do not contend that Grimley was *in pari delicto*.] *Osmond v. Williams*, 18 Beazley, 379; and *Brownley v. Morris*, Cowper. With respect to Grimley's costs, I refer to *Eddleston v. Eddleston*, 9 Jurist. N.S., 472. Grimley had made an offer to submit to judgment for an account, whereas I asked for a specific sum. [WINDEYER, J.: You also asked for £7000 interest.] Yes. But he withdrew his offer afterwards and asked for judgment against us. [CHUBB, J.: That was after you had tried to make the titles rotten, not only the deeds but the grants.] I submit he cannot hark back on his original offer. [CHUBB, J.: Is not the position this—that there is judgment for the amount you have asked for, subject to account?] Yes: but the original offer was rejected. [CHUBB, J., referred to *Miskin v. Hutchison*, 1 Q.L.R., Part III., 17-19, as decided by the Full Court. It was as to the construction of the 54th section of the Act of 1868, which section was almost the same as the 21st section of the 1876 Act.]

WINDEYER, J., then, with the consent of both parties, entered the following record:—"With the consent of the defendants, we extend the time, so that plaintiff can give notice of his intention to appeal to the Full Court against the decision of the Chief Justice on the issues which he found against the plaintiff, and we allow him to argue at once on his notice, the grounds of which are to be drawn up and served on defendants, and which are the same on which plaintiff has already argued his case; the plaintiff consenting to abandon his notice of appeal to the Privy Council, we give him leave to argue his appeal on the whole case. The costs of the motions being left unaffected by this course." Mr. Lilley says he has nothing to add to that motion, but simply says he will apply his argument already addressed to the court to those particular matters in which judgment has been against him. The Solicitor-General says he does not want to answer that except by referring to the argument which he has already addressed to the court. All that remains now is for the Solicitor-General to reply on the whole case so far as he thinks necessary.

Byrnes, S.G. (in reply): It has been conceded that there was evidence to support the findings of the jury, and I claim that the findings of the learned Judge, in so far as they differed from the

jury, should be set aside; in fact, be considered as nothing. On the question of the amendment, I submit that my friend has not explained to the satisfaction of the court how those amendments came to be allowed. His only argument had been, "I did not know; I had no reason to suspect the defendants." It was not a question whether he knew; it was a question whether the plaintiff company knew or ought to have known. I submit that the letter of Mr. Littleton, which has been referred to by my friend, can only bear one construction, and that he knew, and that Sir Thomas M'Ilwraith knew, that the selections had been dummied. My friend said that letter could not be used in evidence against Sir Thomas M'Ilwraith, but Littleton could have deposed to the fact under cross examination. He used this as an argument why the amendment should not have been allowed. [WINDEYER, J.: In point of fact, you say it is an element which should have been taken into consideration as to whether the application or the amendment was *bona fide*.] Exactly. He used it for that very purpose, as showing very strong evidence of want of *bona fides* when the application was made at the far end of the case. If it had been made at any time it would have been evidence of want of good faith, but when it was applied for at the end of the case it was still more evidence of want of good faith. The evidence was strong on all the material part of the case. As to the cases which had been quoted by his friend, I do not dispute that a Judge has large discretion in allowing amendments, but not one of the cases was like this one. That of *Riding v. Hawkins* involved the question of the validity of a will, and it was to the interest of all the persons concerned that it should be decided once and for all. That is all I have to say on the point of the amendment. I have already referred to his Honour's judgment on the question of knowledge; that was, whether the defendants knew that the selections had been dummied. His Honour said that when Finlay came out, he claimed to be relieved of the selections, and shortly afterwards these actions were begun. The defendants did not agree to relieve him of them, and he started these actions without saying one word in his pleadings about dummieing, although in a letter which he sent home he stated that the fact that the selections were dummied was prominently brought before him. Practically, his Honour's judgment was that Finlay must have known all about it. As to the question whether the crown should be made a party to the action or not, my friend cited the case of *Cumming v. Forrester*, 2 J. and W., p. 388. If they looked at that case they would see that it was an absolute authority that the court would not proceed in the absence of the Crown. It was a question between the parties, and incidentally it was suggested that

the Crown had been deceived in the issue of certain grants. The moment that suggestion was raised the Master of the Rolls said:—"If the Crown has been deceived, and has proceeded on a mistake, that is a reason for revoking letters patent. Then ought not the Crown to be a party? For can the parties, by their own acts, remove the grant? If the defendants were put to their election, and were to elect to take under the settlement and against the letters patent, then could the plaintiff, the other grantee, insist that she must take the part granted to him which he relinquishes? Would the effect be to cast that part upon her, or would it revert back to the Crown? . . . It is clear the Crown is not bound by a grant made under a mistake. Any person might give notice of it and have a *scire facias* to revoke these letters patent on account of the vice appearing on the face of them. . . . The difficulty I have felt has been upon the subject, not much pressed by either party, relative to the rights of the Crown and the effect of a Crown Act being made under a mistake. . . . The power of calling back its grants when made under a mistake is not like any right possessed by individuals, for when it has been deceived the grant may be recalled, notwithstanding any derivative title depending upon it, and those who have deceived it must bear the consequences, but that is foreign to the merits. The parties do not wish to raise the objection, and I do not wish to raise it, for it is not a case where the Crown has any substantial interest. If it had the court would protect it, and would require that the Attorney-General should be made a party. I maintain that a Crown grant which passed an estate to a person can not be invalidated in the absence of the Crown. Otherwise the consequences pointed out in the U.S. case—that private persons might, for the purposes of oppression, attack titles—as the Escheators did in England, would result. I maintain that the Crown alone can attack the validity of a Crown grant, and that in the present case in which ten years have been allowed to elapse since the deeds of grant were issued, that even the Crown would not have much chance of successfully attacking them. Now, on the question of the discharge of the jury and the trial of the case by a Judge alone, I will cite the case of *Clark v. Skipper*, 21 Ch. D., 184-6. In the cases which my friend referred to, the jury disagreed on everything, and the case was reheard on an entirely new order. Then the whole case had to be gone into *de novo*. One word on the question that defendants honestly believed that the securities were good and sufficient—in each case they had the certificate of the solicitors that the securities were in order. If Mr. Littleton thought that the selections had been dummied, or if he had been doubtful about the law, he could have consulted

Mr. Hart, the plaintiff's solicitor, as to how he came to certify that the titles were right, and as to what was the law of Queensland on the subject. He did not do so, however. I maintain that the defendants were justified in acting on the certificate of their solicitors, and would have been responsible if they had refused to do so. [WINDEYER, J.: Were these sums of money advanced by the company paid to Grimley, or paid directly to the bank?] Generally they were paid by his direction into his account at the Queensland National Bank, but there does not appear to have been any settled rule about the matter.

C.A.V.

SAME v. SAME.

Appeal to Privy Council—Final judgment—7 & 8 Vic., c. 69—Order in Council of 1860—Judicature Act, ss. 4, 6, 10.

A judgment given by a Judge in the first instance is not a final judgment within the meaning of the Order in Council, when the other side has given notice of appeal against such judgment.

In such a case, before appealing to the Privy Council, an appellant must exhaust all his remedies here by appeal to the Full Court.

Daguino v. Bellotti, 11 Ap. Ca., 604, followed.

PETITION for leave to appeal to the Privy Council by the plaintiff company against so much of the judgment of The Chief Justice (*supra*) as was not in their favour.

Lilley, and *Woolcock*, for appellants; *Byrnes*, *S.G.*, *Power*, and *Shand*, for defendants; *Feet*, for defendant Grimley.

Lilley: The amount in dispute is £16,000. The appeal is from part of the judgment of The Chief Justice. There is no discretion in allowing an appeal direct; 7 & 8 Vic., c. 69 (P. & W., 3,368), and the *Order in Council* (P. & W., 3,373), allow it on certain conditions. 20 Vic., No. 25 (N.S.W. Statutes and N.S.W. Gazette, 1853-1859, p. 53), was also referred to.

Byrnes, *S.G.*, was called on. In the judgment appealed from, judgment was given against the defendants to the extent of £50,000, from which they have appealed. They have a right to appeal to the Full Court—*Judicature Act*, section 10. The whole case is involved in the appeal. The Court has a discretion. The findings of a single Judge does not constitute a finding of the Supreme Court. The plaintiffs must exhaust their means of appeal here. *Daguino v. Bellotti*, 11 Ap. Ca., 604.

Lilley referred to *Bank of Australasia v. Harris*, 15 Mo., P.C., 797. [WINDEYER, J.: That case was tried when one Judge sat as the Court. CHUBB, J.: That was before separation, and the

only remedy was a direct petition to the Privy Council.] No distinction is drawn in the Order between the judgment of a single judge and that of the Full Court. The judgment was final. [CHUBB, J.: If not appealed from.] It is the same in N.S. Wales. [WINDEYER, J.: The Primary Judge decides as the Supreme Court there] He does so here. Section 6 of *The Judicature Act* makes the judgment of a single Judge the judgment of the Court. That section does not take away the powers of a single Judge to try an equity suit. [Byrnes, S.G.: This was not an equity suit.] I submit it is. The Order in Council reserved a prerogative to the Crown which cannot be limited by a local statute. *The-*

berge v. Laundry, 2 Ap. Ca., 102. [WINDEYER, J.: You need not labour that proposition. It is clear.] By section 4 of *The Judicature Act* a Judge administers law and equity together, and his judgment in an equity suit has the effect of a judgment of the Full Court. Every Judge is now equal to a former Primary Judge. *Pugh v. Heath*, 7 Ap. Ca., 237; *Supreme Court Act Amendment Act of 1861*, 25 Vic., No. 13; *King v. Frost*, 15 Ap. Ca., 548, were cited. The other side can appeal to the Privy Council too. They have to go where we tell them. Under the Order in Council there is a direct appeal to the Privy Council.

WINDEYER, J.: We will reserve our decision until we hear the rest of the case.

The judgment will be found in the Supplement to this volume.

WATSON, FERGUSON AND Co., PRINTERS AND PUBLISHERS, QUEEN STREET, BRISBANE.

THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LIMITED,

v.

GRIMLEY AND OTHERS.

JUDGMENT OF THE FULL COURT.

WINDEYER, COOPER, AND CHUBB, JJ.

(Delivered 12th October, 1892.)

THE Plaintiffs in this case are a Joint Stock Company incorporated in England in 1878 for the purpose of investing moneys in Queensland upon mortgages, and having their principal office and board of directors in London. The first Defendant on the record, Samuel Grimley, was a professional accountant, who, at the time of the transactions disclosed in the case, appears to have been engaged in land speculations. The other four Defendants are Edward Robert Drury, General Manager of The Queensland National Bank, Limited; Sir Thomas McLlwraith, a Member of the Legislative Assembly of Queensland (now Colonial Treasurer); Sir Arthur Hunter Palmer, President of the Legislative Council of Queensland; and Frederick Hamilton Scott Hart, a Merchant and a Member of the Legislative Council of Queensland. These four were the local Directors for the Plaintiff Company in Queensland, receiving remuneration for their services. The deed (Exhibit 7) under which the Plaintiff Company delegated to the Queensland Board of Directors the power of conducting the Company's affairs in Queensland in no way fettered its discretion as to the nature of the securities upon which they should make advances. They were simply instructed not to advance money by way of loan except upon good and sufficient securities, and from time to time they received instructions with reference to the transactions into which they had entered, and which were regularly reported to the London Board. For the proper valuation of the securities to be accepted by the Queensland Board, it is clear that the London Board relied upon the personal acquaintance of the Queensland Directors with the properties offered to them as securities, as they were only directed to get an independent valuation when the properties were unknown to them personally. These four Defendants, in fact, were chosen as the local representatives of the Plaintiff Company because of their intimate acquaintance with the value of pastoral property in Queensland, and because of the confidence universally reposed in them by the community as men of high character for integrity and ability in financial matters. It was contemplated, moreover, by the promoters of the Company that it should work in concert with the Queensland National Bank, and it was for this reason that its general manager was selected as one of the directors

of the Plaintiff Company in Queensland. The expediency of co-operation with the Queensland National Bank seems to have been suggested by consideration of the fact that it is not within the scope of ordinary banking business to advance money to customers on securities where, from the nature of the business speculations in which the customers are concerned, the repayment of the advances may have to be deferred for years and thereby render the account inoperative. There were, however, many securities likely to be offered which would be entirely safe for a mortgage company to take, and dealing with which was more properly the business of such a company than of a bank. The advantage of the two institutions working together would be that the bank would be able to carry on its legitimate business of making temporary advances to its customers in the confidence that such advances would be ultimately covered by the mortgage loans advanced by the Plaintiff Company, and the latter would have in this way not only the business brought to it by the customers of the bank, but it would also have brought into the management of the Plaintiff Company all the knowledge of the financial circumstances of the bank's customers and all the business ability possessed by the bank's general manager. The securities accepted by the Queensland Board, which are the subject of the present action, were accepted as securities for money paid to the Queensland National Bank to cover advances made by them to the Defendant Grimley under this general understanding. These to an amount exceeding £45,000 were obtained by the authority of the four Defendants from the Plaintiff Company upon the security, *inter alia*, of a number of Crown Grants of land which they accepted as mortgage securities for the sums advanced to him from time to time during a period extending from 1883 to 1888. Grimley being unable to pay this amount, the Plaintiffs in 1887 entered into possession of the mortgaged lands. It would appear that at the commencement of the Company's business, the Queensland Board of Directors made advances, to the great advantage of the Company, on city property in Brisbane, but discontinued this on the instructions of the London Office, which directed them in future only to make advances on country properties, of which character were all the securities in question in the present

action. For some time after its formation in 1878 the financial operations of the Company were highly successful, dividends being paid from time to time at rates varying from 7 to 13 per cent., but in consequence of droughts and a period of general financial depression in the Colony, which widely affected land-holders and borrowers, the dividends of the Company afterwards fell considerably, and, concurrently with the general depreciation of property, the securities held by the Company fell greatly in value. The dissatisfaction created in England by the falling-off in dividends seems to have resulted in the London Directory in 1886 sending out to the Colony Mr. Littleton, one of their Board, to investigate the Company's affairs, and subsequently, in 1888, to their sending Mr. Finlay, their general manager, who instituted the present action against the Defendants.

In this action the Plaintiffs sought to recover from the Defendant Grimley the sum, including interest at the rate of 9 per cent., of £66,264 8s. 2d., under the covenants contained in his mortgages. Against the four Defendants, constituting the Queensland Board previous to their resignation on the commencement of these proceedings, the Plaintiffs sought to obtain a declaration that they and each of them were personally liable to make good and pay to the Plaintiffs such part of the said sum of £66,264 8s. 2d. as might not be paid to them by the Defendant Samuel Grimley, and as could not be obtained by the realisation and sale of the securities given therefor, or, alternatively, the sum of £66,264 8s. 2d. as damages for the Defendants' neglect and breach of duty as Local Directors of the Plaintiff Company in and about the making of the advances in the claim mentioned.

The writ was issued on the 26th November, 1888, and on October 2nd, 1891, the Plaintiff Company set the action down for trial by a Judge alone, upon which the Defendants, under Order 35, Rule 3, of "The Judicature Act of 1876," gave notice that they desired the action to be tried by a Judge and jury. Upon this the Plaintiff Company took out a summons for an order, under Rule 28 of the same Order, for a trial by a Judge without a jury, and thereupon the Chief Justice (Sir Charles Lilley), the Judge to whom the action was assigned, made an order for the trial of the action by a special jury from an enlarged panel, but, in the words of his order, "reserving leave to myself to discharge such jury and to try the said actions"—meaning this and another action—"or either of them, without a jury, if at such trial I should see fit to do so."

The trial having come on in due course on the 5th November, 1891, before the Chief Justice, the Defendant Grimley, at the opening of the case, offered to submit to judgment, subject to an account, for the principal sum claimed by the Plaintiff Company, with interest at the rate of 7 per cent., or, as put by the Chief Justice in his judgment, "for his indebtedness." This offer the Plaintiffs refused, alleging that his agreement was to pay 9 per cent.

On the fifth day of the trial the learned Judge called up the counsel for the Plaintiffs and the Defendants, except Grimley, and privately intimated to them that he intended to act on his reservation and try the case himself. To this, the Solicitor-General objected, and the case

proceeded as from the commencement. On the afternoon of the thirty-seventh day of the trial, after the evidence on both sides had been closed, the Plaintiffs' counsel, Mr. Lilley, asked leave to amend the claim by raising an entirely new case, different both in law and fact from that which the parties had been contesting for thirty-seven days. The original case for the Plaintiffs simply being that the Defendant Grimley owed them a certain amount on his mortgages, and that the other Defendants had recklessly and negligently made advances to him on securities insufficient in point of monetary value to cover the advances made, the learned Counsel now asked that the claim should be sustained, not on the ground that the securities were insufficient from a monetary point of view, but on the ground that the securities were entirely worthless, because, as was alleged, Grimley had entered into contracts with the selectors who originally took up the lands comprised in the mortgage securities, with the view of illegally obtaining the Crown Grants which would be ultimately issued to them. In short he asked to be allowed to charge the four Defendants with making a contract with Grimley which was not only void, but, as he also contended, one which brought them and Grimley within reach of the criminal law, under the provisions of "The Crown Lands Alienation Act of 1876." This extraordinary change of front was naturally resisted by all the Defendants: by Grimley because its object was to destroy his title, by the other Defendants because it was a case entirely different from that which they had been contesting not only during the thirty-seven days through which the trial had been dragging, but also during the three years subsequent to the commencement of proceedings. His Honour, however, allowed the amendments required to establish this new case without imposing any terms as to costs up to that date, the question of costs being reserved and afterwards decided against the Defendants.

The Defendants were given leave to amend their pleadings, and the trial was adjourned to enable both sides to make the amendments so allowed. These on the side of the Plaintiffs are embodied in the paragraphs in the claim numbered 13a to 13g inclusive, and 19a. The first three of these paragraphs state that the 12,778 acres of land which constituted the security for the advance to Grimley of £15,827 were not applied for by way of conditional purchase by the persons applying for the same respectively for the *bond fide* use or occupation or benefit of such applicants, but as servants or agents of or as trustees for Sir Joshua Peter Bell, or as servants or agents of or as trustees for the firm of Bell and Sons. Secondly, that the persons so selecting the said lands had entered into agreements, express or implied, to permit Sir Joshua Peter Bell, or the firm of Bell and Sons, to acquire the said lands by purchase or by transfer. The four paragraphs from 13d to 13g state that after the death of Sir Joshua Peter Bell the conditional purchasers, or as called throughout the case "selectors," of these lands occupied them as the servants or agents for the Defendant Grimley or as servants or agents for Bell and Sons. Paragraph 19a alleges that certain other 3,144 acres of the land, at the time of the loan thereon being authorised by the four other Defendants, were comprised in conditional purchases in respect of which the conditions of occupation had not been fulfilled,

and in respect of which the Crown Grants had not been issued. These new paragraphs in fact allege that a series of agreements of a "dummying" character had been entered into, first between Sir Joshua Peter Bell and the selectors of the lands in question and afterwards between the same selectors and the firm of Bell and Sons or Grimley, in contravention of the provisions of Section 21 of "The Crown Lands Alienation Act of 1876."

The Defendants, on being served with the amended claim, applied to the Chief Justice in Chambers to strike out the amendments as embarrassing, irrelevant, and tending to delay the fair trial of the action. This application was dismissed with costs. The Defendants then pleaded, and demurred to the new paragraphs of the claim. The demurrer was ordered to stand over till the motion for judgment, and was on that motion overruled.

The trial was resumed on the 9th of May, 1892, and some additional evidence having been given by the Plaintiffs on the amended pleadings, and counsel on both sides having addressed the jury, His Honour, on the forty-seventh day of the trial, summed up, and submitted in writing no less than one hundred and forty-three questions for their consideration, to which he required answers. The jury, though by law they might have been discharged if not agreed at the end of six hours, were nevertheless kept together for three days, and on the 21st day of May returned their findings. All the questions framed upon the original case made against the Defendants other than Grimley they answered in their favour, and entirely acquitted them of negligence, fraud, or any motive other than the desire to serve the interests of the Plaintiff Company. For Grimley they found that his contract was to pay 7 per cent., and not 9 as the Plaintiffs contended, thus reducing the Plaintiffs' claim against him by £7,000. To some of the questions submitted to them upon the new case set up in the amended claim, the jury returned answers in favour of the other Defendants, and on others, which turned upon issues the onus of proving which lay upon the Plaintiffs, the jury were unable to agree.

The learned Chief Justice, having recorded the answers of the jury, discharged them; after having adjourned the further hearing, at the time of doing so again reserving the right to try the case himself. On the 18th of July judgment was moved for by the Plaintiffs, and the Defendants, by their respective counsel (Mr. Lilley for the Plaintiffs, the Solicitor-General and Mr. Feez for the Defendants) addressed themselves to His Honour for five days on the findings of the jury, and in this argument the counsel for the Plaintiffs asked the Chief Justice to uphold some, to set aside some, and alter the remainder of the findings of the jury, and to give judgment for the Plaintiff Company on his own view of the evidence. This right the Chief Justice again asserted that he reserved to himself, and on the 16th day of August he delivered the judgment now appealed from. On the greater part of the case he gave judgment for the Plaintiff Company, assessing the damages against Grimley at the amount claimed, with interest at 7 per cent. subject to an account, and against the Local Directors at certain specific sums, which, taking the view of the case which we do, it is unnecessary to particularise.

As to the remainder, however, of the original claim of the Plaintiff Company, he gave judgment for the Defendants other than Grimley, taking upon such portion of the case the same view as was taken by the jury, and as was pronounced by them in their findings.

Against this judgment Grimley and the other Defendants have appealed to the Court on different grounds, but it is only necessary to consider those here set out:—

1. Grimley has appealed against so much of the judgment as directs the payment by him of the Plaintiff Company's costs of the action.

2. All the Defendants have appealed against the judgment so far as it rests upon the amended claim and overrules their demurrer to that part of the case, on the grounds—

- (a.) That His Honour ought not to have allowed such amendments, and that his judgment on such amended claim, even if rightly allowed, as well as on the original claim, was erroneous.
- (b.) That His Honour had no jurisdiction to make the reservations in his Order of the 21st of October, 1891, under which the Defendants allege that he improperly set aside the findings of the jury.

Upon the ground of these objections, the Defendants, other than Grimley, ask the Court to set aside His Honour's judgment as far as it concerns them, and, upon the findings of the jury, to pronounce judgment in their favour; whilst Grimley asks that so much of the judgment as condemns him in the costs of the action may be set aside.

Taking these objections in chronological order, we first deal with the question whether His Honour, in making his Order of the 16th of October, 1891, directing that the action should be tried by a special jury, had power to reserve to himself leave to discharge the jury and to try the action himself without a jury, if at such trial he thought fit to do so.

Without going into the question how far the Common Law right to a jury has been modified by Order 35, Rule 3, Judicature Act (Queensland), and into the exact meaning of its words "that the Defendant may, upon giving notice to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried," which as the word "may" is used point to the conclusion that there is a judicial discretion limited by the two considerations mentioned in Order 35, Rule 28, the fact remains that the learned Judge did direct the action to be tried by a jury, though, if he had thought it desirable, he might, perhaps, under Order 35, Rule 28, have directed the issues of fact to be tried without a jury. Having ordered the case to be tried by a jury, the question whether he had power to make the reservation which he did seems to us to resolve itself into the question whether he had the right, *ex mero motu*, to rescind his own order. No authority has been cited for the proposition that a Judge has power, except on an *ex parte* application or by consent, to reverse his decision when once recorded, whilst there is the decision of Mr. Justice Harding in the case of *Russell v. Taylor*, decided on the 7th January, 1887, to the effect that he has no such power. Indeed, the learned counsel for the Plaintiffs,

Mr. Lilley, abandoned this argument and admitted that it was impossible to maintain a contention which would be subversive of all finality in litigation, and would give to a Judge of first instance a power only possessed by a Court of Appeal. If the learned Judge had no power to rescind his own Order he had no power to reserve such a discretion to himself, the reservation meaning nothing more than an announcement, without warrant of law, that if he thought fit he would at some future time reverse his Order that the case should be tried by a jury, and would direct the case to be tried by a Judge alone. The Judge saying that he would reverse his Order on some contingency arising could obviously have no more effect than a reversal which he would be powerless to effect after the contingency had arisen. Taking this view of the want of power in the Judge to make the reservation, it is unnecessary to decide whether this was or was not a case which previous to the passing of the Judicature Act could be tried without a jury as a pure Equity case, as His Honour says in his judgment. Whether it be regarded as a case in Equity, or, so far as Grimley was concerned, as an ordinary Common Law action of debt upon a covenant, and, so far as the other four Defendants are concerned, as a mere action against agents for damages arising from their negligence, the case must be dealt with as one which had been ordered to be tried by a jury. Viewed in this light it is impossible to uphold the course taken by the Judge in first proceeding with the case as he did till he obtained the findings of the jury, and then in setting those findings aside and deciding the case himself under his supposed power of reservation of such right. From the intimation privately given to the counsel for the Plaintiffs and the counsel for the four Defendants only, excluding Grimley, as recorded in the note of the matter taken by His Honour at the request of the Solicitor-General, it would appear that His Honour from the fifth day of the hearing at all events, though he himself says from the beginning, to use his own words, was "sitting to take the evidence as the Judge dealing with the whole case, as well as Judge with the jury on questions of fact;" and from the expression in his judgment that "repeatedly during the trial I stated that I was conducting the inquiry so that should the jury fail to agree I would dispose of the case myself," it would appear that His Honour was really trying the case concurrently with the jury, as the counsel for the Plaintiffs asserted he had a right to do, though this course was objected to by the Solicitor-General. Whether he is to be understood as trying the case concurrently with the jury or as beginning to try it after the jury was discharged, the course pursued was equally, in our opinion, without precedent or warrant of law. The consequences which might follow on a Judge assuming the right to try a case concurrently with a jury are such as might lead to a travesty of justice too grotesque to allow of contemplation as a mere possibility. Counsel would never know whether he had to satisfy the jury or the Judge in matters of evidence. Thinking that he had satisfied the jury on points which to them seemed to settle the merits of the case, he might be afterwards upset on a view of the evidence which the Judge secretly entertained, but

with respect to which, as long as it was his duty simply to direct the jury upon the law, he would be restrained from expressing any opinion in opposition to that of the jury. The well-defined limits of the respective provinces of Judge and jury would be either completely obliterated in a way that would be most inexpedient in the conduct of a case that was supposed to be tried by a jury, or the most unseemly collisions of opinion might take place between the two tribunals thus sitting contemporaneously. Is one party to ask the jury to find the facts in his favour, the other to be at liberty, seeing the jury is leaning against him, to ignore them and address himself to the Judge? Given the right to take this course, are the Judge and jury to race as to which is to be the first to deliver the verdict, or is the Judge to be at liberty to keep his finding to himself, and altogether *in petto* if he concurs with the finding of the jury, but to be at liberty to produce it if he disagrees with their view? It cannot be imagined that when the Legislature gave a right to a trial by jury, subject to the opinion of a Judge as to whether the case was one suitable for such mode of trial, that it ever contemplated this right being destroyed by a process which would be so utterly subversive, we think, of that confidence in the administration of justice without which respect for the law cannot be maintained.

The consequences would be equally objectionable if the Judge is to be allowed to take the course of discarding the reasonable findings of the jury and to find for himself on the evidence given in the case.

Judgment was moved for by the counsel for the Defendants on the findings of the jury which were recorded at the trial, and any counsel would naturally suppose that it was on the law bearing upon such findings that he would have to found his motion for judgment. In this case, however, the learned Solicitor-General told us that, having argued his motion for judgment for a week on the findings of the jury, he did not know till three weeks afterwards what the findings of the learned Chief Justice were; and then only on the day after the learned Chief Justice gave his judgment did he discover what they were on seeing them in a newspaper, when it appeared that they differed from the findings of the jury, and moreover that His Honour had found for himself on the issues upon which the jury did not agree. It would clearly be idle for counsel to address himself to a Judge on the findings of a jury if he was afterwards to run the risk of being upset upon some view of the facts which the Judge had adopted in opposition to the jury, and of which view the counsel was allowed to remain in entire ignorance without a possible opportunity of arguing upon it. The learned Judge says that he adopted the course which he took because the waste of money in a new trial of the new issues "would make such a course intolerable." To us, however, it seems that the course which may lead to injustice is that which should be regarded as intolerable. We cannot recognise as sound or as in any degree adequate the reasons given by the learned Chief Justice for the unprecedented course which he adopted in setting aside the findings of the jury, trying the case himself, and giving judgment upon a set of findings of which

counsel was entirely ignorant. Neither considerations of time nor of expense can be weighed in the balance against the duty of acting according to law, and maintaining those recognised methods of procedure which experience has taught us are necessary to secure the uniform and even-handed administration of justice. Experimental short cuts to justice, even if laudable in intention, too often result in the mere illustration of the proverb, "The shortest cut is often the longest way round," to make them safe for adoption in the administration of the law.

The case was, in our opinion, one eminently suitable for determination by a jury of business men, and involved no such subtlety of reasoning or complexity of facts as made it more desirable that it should be considered by a lawyer with a legally trained mind rather than by laymen of intelligence. In Grimley's case the only question was whether he had to pay 7 or 9 per cent. interest on the loans. As to the other Defendants the question simply was whether the Defendants as agents were guilty of fraud and negligence to an extent sufficient to make them liable, His Honour properly telling the jury that they were not liable for mere error of judgment if they exercised an honest discretion in discharging their duties. The question how far the most careful men might misjudge the value of securities fluctuating from time to time under the influence of droughts and periods of commercial depression was one essentially for business men; whilst the facts which constitute dummying are of a nature quite familiar to our Australian juries. His Honour was, therefore, quite right in sending the case to a jury in the first instance. If he afterwards thought a necessity had arisen for trying the case again on any undetermined issue of fact in it, it seems to us that, following English precedents, His Honour should have submitted such questions as were really necessary to another jury instead of taking the course which he did. His Honour says that the jury not only did not agree about matters that seemed to him to be proved, but gave inconsistent and irreconcilable answers in the case, and that there was no reasonable expectation of better results from a trial before another jury. So far from agreeing with His Honour, we are of opinion that the jury have answered the questions with singular correctness, and displayed an amount of discrimination and acumen rarely exhibited by the best of juries, but which was to be expected from a jury of gentlemen possessing the intelligence and business capacity to which His Honour himself has testified. As far as they agreed we entirely concur in their findings; and where they were unable to reach unanimity, we think that the evidence was of such a character that they would have found for the Defendants, had they been told that to do so was their duty when, in considering issues the onus of proving which lay upon the Plaintiffs, they found the evidence so obscure that it was impossible to make up their minds upon it. In any event had the learned Judge thought it necessary to obtain a finding upon the issues raised upon the amended case, and which he appears by his judgment to have throughout regarded as "vital" to the case, there would have been no necessity to have re-tried before another jury all the questions submitted on the original case, and upon which the findings of

the jury were clear and distinct. It was in trying these issues that nearly forty days had been spent, and the mere re-trial of the issues raised in the amended case would have occupied but a short time before another jury, as nearly all the evidence which the Plaintiffs had to support their amended case was obtained, as the counsel for the Plaintiffs admitted, from the Defendants themselves in the course of their cross-examination, and it will be seen on perusal to have occupied but a very short time. This was the course pointed out as correct, in *Marsh v. Isaacs*, 45 L.J. 9 C.P. Div. 506, where Lord Coleridge says that the rules of the Judicature Act provide that "if there is a miscarriage on one issue the Court may give judgment on those issues which are satisfactorily disposed of, and send the action down for trial on the others; and, therefore, it appears that when the causes of action are separate and distinct, the Court has perfect power to treat them separately." *Burgoine v. Moordaff*, L.R. 8 P.D. 205, in which two juries disagreed, cited as an authority for the course taken by the Chief Justice, really shows that the course for His Honour to have taken, if he thought the case would be better tried by a Judge, was to have left it to be tried by another Judge, as *Hannen, J.*—the parties not objecting—did in the case referred to, observing "that he should not have made this order if it would have involved his trying the action himself since he had formed his opinion on the case," as His Honour probably did here after his intimation to counsel that he was sitting as before mentioned.

Ex parte Morgan, L.R. 2 Ch. D. 72, cited by His Honour as an authority for the course which he took in reserving power to try the case himself, and in acting upon such attempted reservation of power, is no authority for the course taken by him. All that case shows is that, where at the trial leave has been reserved to move the Court above to enter a judgment for one party though the jury have found for the other, such motion may be made and the Court of Appeal may enter judgment as by leave reserved. That is a very different thing from a Judge making an order deciding, upon an exercise of judicial discretion, that the case must be tried by a jury, and then, because the jury have disagreed on some part of the case, practically reversing that decision by trying it himself.

How careful courts are not to take the decision of issues of fact from the arbitrament of a jury when once submitted to them may be seen from the course taken by Lord Cottenham, in *Evans v. Prothero* (1 D.M. and G. 572), in which case the Lord Chancellor, though the amount in dispute was only £21, directed two new trials. As pointed out by James, L.J., in *Ex parte Morgan*, 2 Ch. Div. 72, he would, "if he had felt himself so warranted by the principles and practice of the Court, have disregarded the verdict," and dealt with the case himself. *Ex parte the Freeman of Sunderland*, 1 Drew 184, is to the same effect.

The learned Chief Justice says in his judgment that the jury disagreed, and that he discharged them, which would seem to imply that he had discharged them because they were unable to agree. It appears, however, that nothing was said by His Honour in any way intimating that he discharged them because they had disagreed, or intimating to counsel that he regarded as of no consequence the

complete answers which they had given to the questions framed upon the original claim. Under the circumstances, therefore, counsel could never suppose that the jury had been discharged because they had not agreed in the ordinary sense of a jury not agreeing, and that because they had not so agreed it would be necessary to ask for a re-trial of the issues before another jury. Much less would counsel think that the Judge regarded the case to such an extent as *res integra* that he had to address the Judge as a new tribunal about to consider the evidence afresh. Herein lies the difference between moving upon leave reserved within the meaning of the case cited by His Honour and the effect of the course taken in this case. In the one case the counsel would know what was his position and his duty, in the other he is left entirely in the dark, as Mr. Lilley, for the Plaintiffs, admits that His Honour never intimated during the argument of the Solicitor-General, on motion for judgment, that he was going to wipe out the findings of the jury which he had entered on the record. Under such circumstances counsel did not know what part of the evidence the learned Judge considered admissible or inadmissible against the Defendants other than Grimley, and had no proper opportunity to address himself to such questions, as the objection to evidence when taken was not determined by the Judge at the time, but the evidence admitted subject to the objection which was held over for consideration on the motion for judgment, and then, as far as we can see, never dealt with by the Judge. The practical injustice done to the Defendants in allowing the case to be so conducted is apparent enough. Fortunately the findings of the jury make the course pursued here a matter of no consequence; but were it to be regarded as correct, the result in many cases might be a failure of natural justice through the Judge adopting a course so eminently calculated to embarrass a party in the conduct of his case and to prejudice its fair trial. The difficulty in which the Defendants were placed by the course adopted was increased by reason of the Judge allowing the case to be amended and a new case to be substituted on the thirty-ninth day of the trial, on which, and not upon the original case brought into Court, he finally decided against the four Defendants other than Grimley. Had their counsel known that it was this portion of the case which was in the opinion of the Judge all-important, and that he had discarded the findings of the jury, he would have solely addressed himself to it, and might, if he had thought it necessary, have asked that further evidence should be taken on the question as to how far the Plaintiff Company was in *pari delicto* with the Defendants. His Honour certainly told the Solicitor-General that he would hear him generally on the law and facts, but if he had made up his mind to discard the findings of the jury, we think that he ought to have said so.

We need not go into the question raised by His Honour whether the Court is powerless to decide a case if a jury, over and over again, find contrary to the conscience of the Court, or find evidence so inconclusive that they fail to arrive at unanimity. The surmised possibility of another jury failing to return a verdict which His Honour would have

approved, or of their failing to agree, are equally contingencies that cannot be taken into consideration, for after all, these would only be positions in which courts give way to juries. For "if," as Lord Cairns says in *Ex parte Morgan* L.R. 2 Ch. Div. 98, "several juries find in the same way, the Courts have never persisted in setting aside consecutive verdicts," and as pointed out in *Clarke v. Skipper*, L.R. 21 Ch. D. 134, the possibility of a jury disagreeing ought not to be taken into consideration when under the Rules a party has a *prima facie* right to have the case tried by a jury. It is enough to say that nothing like such a case arose here, and that there was no necessity for departing from the practice established by numerous English decisions of sending a case to a second jury if unanimity has not been arrived at by one in respect of material questions which have been directed to be submitted to the decision of a jury.

The objection taken to the amendment being allowed was, we think, well founded. With every desire to support the exercise of judicial discretion by a Judge making amendments with a view to determine the real question in controversy between the parties, we cannot uphold the course taken in this case, and there are numerous cases to show that where a court of appeal has thought the discretion has been wrongly exercised it will interfere as the justice of the case may require. In our opinion, the amendment was made neither on a *bond fide* application, nor with reference to a matter which the parties came into Court to determine. The real charge made by the Plaintiffs against the Defendants other than Grimley was that they negligently, and for purposes other than those of serving the interests of the Plaintiff Company, had made advances, and had accepted securities which were insufficient in money value to cover the advances; and in their claim they asked that the four Defendants should be ordered to pay such part of the sum of £66,264 8s. 2d. as could not be obtained by the realisation and sale of the securities given. In their new case they averred that the securities were worthless, because they gave no title, and consequently were unmarketable. Whether the original case was one of Common Law or Equity, it may be here observed that in the new case, as the securities were regarded as altogether bad, there was no title to be re-conveyed, and no sale being possible, no account would be necessary; and the action therefore simply sounded in damages as the only mode of compensating the Plaintiff Company; another argument it may be observed in passing why, the case no longer bearing anything but a Common Law aspect, it should have been treated as a Common Law case, and subject to all the incidents of re-trial before another jury, if such new trial was required, instead of being re-tried by the Judge.

There are two guiding rules referred to by Bramwell, L.J., in *Tildesley v. Harper*, L.R. 10 Ch. Div. 393, to be observed in deciding, upon applications for amendment, how far a proposed amendment would be fair to the party against whose interest it is to be made. They are whether the application is *bond fide*, and whether the amendment proposed will do any injury to his opponent which cannot be compensated for by costs or otherwise. Upon the question of *bona*

files. we have no difficulty in coming to the conclusion that it was owing to no slip or want of knowledge on the part of the Plaintiff Company that no reference was made in the original claim to any supposed defect of title in the securities accepted by the Queensland Board. An examination of the pleadings and evidence leaves no doubt in our minds that the Plaintiffs not only had perfect confidence in the validity of the Crown Grants as title deeds, but had that confidence in them though the circumstances under which Grimley had obtained them were well known to them. It is clear from the allegations in paragraph 13 of the claim that the Plaintiff Company knew that the lands on which a sum of £23,740 10s., alluded to in paragraphs 9 and 10, was advanced, were conditional selections. There is evidence, moreover, that the Plaintiff Company was well aware of the arrangements between Grimley and the conditional purchasers as long before the action as Mr. Littleton's visit to the Colony in 1886 to examine the state of their affairs, as Sir Thomas McLlwraith repeatedly says in his evidence that Mr. Littleton had been given all the information which he had respecting these securities. In his letter of 26th December, 1886, Mr. Littleton says—"It is no use showing impatience about Grimley's account. Nothing absolutely can be done. There is no doubt that that account was taken up in a *bond fide* manner for Bell and Sons, and with the mill would have been sold if all had gone well. No one that I can see has been approaching to dishonesty in the matter." In his letter of the 9th January, 1887, in which he gives a report on Grimley's "selections" of 6,770 acres connected with the mill, Mr. Littleton distinctly shows that he knows that these lands were selections not made by Grimley himself but by other people. He adds in a postscript to his letter that "Sir Thomas McLlwraith has been perfectly candid about the position of these selections." In his letter of the 20th of January he says, speaking of Grimley's account—"The history of that account is simple. When the Darling Downs Company took over Jimbour there were many dummied selections. Sir Thomas, as manager of the Darling Downs Company, would have nothing whatever to do with them, but Grimley, who had been long in the employment of Bell and Sons, undertook to do all that was necessary to get rid of the dummies and secure the land for Bell and Sons. There was no great harm in this in itself; Bell and Sons would doubtless have handed these selections over to the Darling Downs Company, and there can be little doubt that there was a tacit understanding to this effect. The money was therefore advanced to Grimley for this purpose." . . . "Grimley, on being cross-questioned by me, explained how the money was spent. I have no reason to doubt the distinct and repeated statements of these gentlemen; and it must be remembered that upset price of land was high in these districts, and an exaggerated value of the land obtained a few years ago, so that dummies had to be paid high." The report (Exhibit 549) of Mr. Finlay, the General Manager of the Plaintiff Company, who came to the Colony in October, 1888, which report was sent to the London Board with his letter of the 15th November, 1888, also conclusively shows that the Plaintiff Company was aware of the character

of Grimley's dealings with the conditional purchases which constitute the securities outside the mill selections. Mr. Finlay's words are—"Grimley's own story is that the selections he was so anxious to secure were dummied selections on Jimbour Run. Bell had advanced to the selectors 10s. per acre or thereabouts, and it was considered necessary that the freehold should be secured, not only to save the 10s. already invested for the benefit of the Jimbour property." He further states "that though the Directors of the Darling Downs and Western Land Company, Limited, could take no official cognisance of 'dummyism,' it was an understood thing that Grimley was to apply to the Investment Company for a loan, and when the selections were secured they were to be transferred to Jimbour, the Investment Company being paid off. Grimley, in return for his good services, was to be provided for, and a glance at the account, under the section *Mill Account*, will show how the provision was effected. A Mr. Ensor, an old and trusted servant of the Jimbour Estate, was employed to have these selections secured, and his evidence is forthcoming if required." Though the learned counsel for the Defendants called the attention of the Chief Justice to the evidence of this knowledge on the part of the Plaintiffs the learned Judge allowed the amendments, but gave no reason for doing so. Looking at this evidence, showing knowledge on the part of the Plaintiff Company, we are of opinion that the Chief Justice should have attached no weight to Mr. Lilley's statement that, till the cross-examination of the Defendants, the Plaintiffs did not know that the Local Directors were aware of the nature of Grimley's dealings with the conditional purchases, because they had evidently got from Sir Thomas McLlwraith and the other Defendants all the information which they had upon the subject, as appears from the letter of Mr. Littleton and Mr. Finlay's report just quoted. In short we are of opinion that the application to amend was not made *bond fide* to raise any question that had ever been in dispute between the parties, but was only made when it was, after all the evidence had been taken and the addresses had only to be delivered, because the counsel for the Plaintiff Company then saw that his original case had failed. The Plaintiff Company were in the position of mortgagees in possession of the securities, and had been so since the year 1887. They had since then cut down timber and had carried on a sawmill business on the property. No one had attacked their title under their Crown Grants which had been issued eight years before, and under such circumstances it is impossible for us to believe that this attack upon their own securities was made with any sincerity, or was other than a desperate attempt to win at all hazards in a litigation the costs of which would possibly be as great as the value of the securities. It is impossible to say that such an amendment would not come upon the Defendants as a surprise, unveiling as the new case did a charge, as avowed by Mr. Lilley before us, of a criminal character, and one which was irrelevant to the issues raised upon the original pleadings as to the monetary value of the securities, apart from any question of title. To use the language of Lord Cairns in *Browne v. McClintock*, 6 H. L. 453: "If the

case upon which the Plaintiffs desire to proceed is not alleged in substance, it is not in the power of the Court, consistently with justice and fair dealing, to allow another case to be pressed upon the Defendants, in consequence of facts which may either come out in the process of investigation, or, as was the case in the present instance, as it seems to me, by a kind of afterthought, the original case upon which the parties founded their first contest having entirely failed." The irrelevancy of the evidence as to dummying by Grimley was admitted on objection being taken to its reception as against the other Defendants; but it was admitted by the learned Chief Justice as against Grimley, on the ground that it went to his credit, and was allowed by way of cross-examination of Grimley, simply because he was a defendant, though he was called as a witness for the Plaintiff Company. The evidence thus obtained seems, however, to have been afterwards used by the Judge against the other Defendants. In *Lever v. Goodwin Brothers*, W. Notes, 1887, 106, the Court of Appeal held that where a question of fraud had been attempted to be raised on the cross-examination of the Plaintiff, and was irrelevant to the original issues raised on the pleadings, an amendment was rightly refused. In *Symonds v. the City Bank*, 34 W.R. 364, North, J., when refusing an amendment asked for with the object of showing misrepresentations other than those originally charged, said, "If it could be made without prejudicing the defendants I should make it, but no amendment could displace the fact that the now alleged misrepresentations were not originally put forward as material, and that there has been no opportunity of meeting these charges." We concede that every case must, with regard to the challenged propriety of an amendment, be considered by the light of its own peculiar circumstances; but the cases above cited show that Courts are slow to allow amendments which spring upon parties entirely new cases, and, in particular, charges of fraud not made before. *Riding v. Hawkins*, 16 L.R. P.D. 56, shows that, even where the Court thought that the amendment was properly allowed, the party affected by it was entitled to a new trial, on the ground of surprise, and was so entitled even when a postponement was offered and refused; as in this case it not unnaturally was, when the taking of evidence would have involved the sending of another Commission to England, and a further delay of six months, during which the jury might have forgotten the evidence, or a jurymen might have died, and the trial have proved abortive. In any event, assuming the learned Chief Justice to have been right in allowing the amendments, the Defendants should have been allowed, instead of being ordered to pay them as they were, all the costs which had been incurred and wasted on a trial which had already occupied thirty-seven days, and had resulted in the substitution of an entirely new case on which alone judgment was ultimately given for the Plaintiff Company by the learned Judge, it being, he says "the pith of the case." Had the Plaintiff Company brought this amended case into Court at first, allowing for all prolixity of argument, it might have been disposed of by demurrer in a few days, or the Defendants might at the trial have been pre-

pared to meet the serious charge raised against them, by examining Mr. Littleton and Sir James Garrick and others in England to show knowledge and acquiescence.

The Defendants, moreover, urged as an objection to an amendment which raised the question of the validity of a Crown Grant, that the Crown must be made a party to the trial of such a matter, and that a private person was not at liberty to question the validity of a Crown Grant in the absence of the Crown, or at all events without the sanction of the Crown; whilst the fact that the Crown had for eight years taken no steps to avoid its grant was evidence raising a vehement presumption that if there had been any irregularity or illegality in the performance of the conditions upon which the conditional purchasers could alone obtain their grants the Crown had waived the irregularity or illegality. Lest it should be supposed from the words used by the Chief Justice in his judgment, "if the presence of the Attorney-General were required, the objection for want of parties came, probably, too late in the day," that there had been waiver of this objection by counsel for the Defendants, if indeed it was not a matter of which judicial notice should be taken, we think it right to point out that an examination of the Judge's Notes shows that the Solicitor-General took this objection on the application to amend being made, as well as he stated, without contradiction, upon the application to strike out the amendments. A very full note of the same objection having been taken by the Solicitor-General also appears on the notes taken by the learned Chief Justice on the argument of demurrer. It runs—"That no person except the Crown can litigate the validity of a Crown Grant or of any title derivatory therefrom on the ground of its illegality. The Crown is not represented here, and no application has been made by the Plaintiff that the Crown should be added. The Attorney-General has not been made a party, and it is too late now to make the Attorney-General a party." It appears to us, therefore, that the objection, if well founded, instead of being taken too late, as the Chief Justice appears to suggest, was taken as soon as it could have been, and was argued on the three occasions appropriate for raising such an objection.

Section 4 of "The Crown Lands Alienation Act of 1876" having enacted that every grant should "be valid and effectual to convey to and vest in the person therein named the lands described in it," the question is whether the title so given can be disputed by anyone except by the Crown, or with the consent of the Crown, on the fiat of the Attorney-General, and in some appropriate legal proceeding. In England and New South Wales where the proceeding by *scire facias* is preserved, that is the remedy appropriate; but where, as in this Colony, the proceeding by *scire facias* has not been declared by legislative enactment to be the proper proceeding, the writ of intrusion or an information in Chancery, as pointed out in the *Queen v. Hughes*, L.R. 1 P.C. 81, is the proceeding to be adopted. If it is argued that a writ of intrusion is not like a writ of *scire facias* granted *ex debito iustitie*, and that, if the writ of *scire facias* cannot be resorted to, the subject may be without a remedy, the answer may be that suggested by their Lordships in *The Queen v. Hughes*,

that the Legislature never contemplated that grants or leases of waste lands would be made improvidently by the Governor, and would require to be recalled at the instance of a subject, whilst a writ of intrusion or an information in Chancery would sufficiently protect the rights of the Crown. Section 28 in subsections 8 and 10 of the Act of 1876 provides that the certificate of the Commissioner of the fulfilment of conditions shall entitle the lessees to a grant in fee-simple, and the conditional purchasers in this case having obtained that certificate and their grants upon it, as well as the leases preliminary thereto, it must be presumed that the Crown is satisfied that the parties are properly entitled to their grants. Even if it could be shown that the conditions had not been fulfilled, *Davenport v. The Queen*, L.R. 3 App. Cas. 115, shows that the issue of the grant may be regarded as evidence of a waiver by the Crown. The issue of the grant must therefore, we think, be regarded as *prima facie* evidence that all causes of forfeiture have been dealt with by the Crown "in open Court" under the provisions of ss. 51 and 52 of the Act, and that the question of *bona fide* performance of conditions of occupation and improvement by the conditional purchaser for himself, and not as a dummy, must after that be considered as so far settled as to throw upon the Crown, if it should dispute the validity of the grants, the onus of proving the non-performance of the conditions, if, indeed, the matter is not to be considered as *res judicata*. The almost insuperable difficulty that would lie in the way of the Crown, if attempting to establish such a case, becomes apparent when the necessary evidence would, in most cases, have to be obtained from witnesses who could refuse to give it, on the ground that it would expose them to a criminal prosecution. Were it competent for third persons to reopen the question which we must presume was then decided, all the far-reaching and mischievous consequences might follow, which their Lordships of the Privy Council pointed out in *Osborne v. Morgan*, L.R. 13 App. Cas. 227, as possible, upon any one but the Crown being allowed to raise the question whether a lease granted by the Crown should not be regarded as a nullity. As in that case, the Plaintiff Company here virtually asserts its right to have the grants declared void without the consent of the Crown. It is obvious, as Lord Watson pointed out in *Osborne v. Morgan*, that no decree which they could obtain in this action as to the nullity of the grants could operate as *res judicata* between the grantees and the Crown; and a judgment deciding that the grants are voidable, or, as the Chief Justice says, void, without the consent or even knowledge of the Crown, might, as pointed out by Lord Watson, lead to very singular and unjust results. The same view as to the issue of a lease operating as a waiver was taken by the Privy Council, in *The Attorney-General of Victoria v. Ettershank*, L.R. 6 P.C. 354. In that case their Lordships say—"They are of opinion that the fact of issuing a lease, under the circumstances of the present case, operated as a waiver of previous forfeitures. Upon the assumption that the right of the selector had been determined by forfeiture, his interest would have been extinct, and the Crown could not have been

required at his instance to execute a lease. When, therefore, the Governor executed, and the proper officer issued, the document, it must be presumed that it was intended to waive any forfeitures, and to affirm an existing tenancy." And again, "The waiver of the forfeiture recognizes and affirms the tenancy, and as a consequence all the interests springing from it, one of which in the present case is a right to a grant of the fee." All these observations are pertinent to the case before us, and apply *a fortiori* to the case where not simply a lease but a grant in fee has been issued by the Governor. In the case, moreover, of six of the grants in question it is to be observed that the grants were issued to Grimley after transfer to him of the selections with the approval of the Minister under subsection 9 of section 28 of the Act, when the question would at once arise whether such transfer was in pursuance of any contract forbidden by Section 21 of the Act, and the issue of the grants to Grimley under such circumstances strengthens the presumption that the Crown had waived all possible causes of forfeiture.

The learned Chief Justice throughout his judgment on this part of the case assuming illegal contracts to have been made, treats the grants as if they were not merely voidable, but void, under the provisions of Section 21. We cannot, however, accede to this view, which is altogether opposed to that taken in *Davenport v. Queen*, in which it was held, following a long series of decisions, that the Courts have construed this word "void" as only meaning voidable at the option of the lessors or grantors, and that, following these cases, the language of Statutes, even where public interests are affected, has been similarly modified. We see, therefore, nothing in the use of the word "void" respecting contracts declared to be illegal by Section 21, which takes the case out of the imperative rule that no proceeding shall be taken to avoid a Crown Grant except with the consent of the Crown. As stated by Miller, J., in the case of the *United States v. Throckmorton*, 93 U.S.R. 8 Otto 61—"The reason of this is obvious, namely—that, in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and his authority to the suit. He should also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill." It would be a very dangerous proceeding—one threatening the title to millions of acres held under grant from the Crown—if any private person, to suit his own purposes, could without reference to the Crown get a grant declared void, perhaps after years of possession by the grantee and the expenditure of large sums of money upon the land.

Whatever may be the apparent weight of the arguments against allowing persons to question the validity of a Crown Grant in suits to which the Crown is not a party, it may be that *The Case of Monopolies*, 11 Rep. 84, *Alcock v. Cook*, 5 Bing. 340, and *Gladstones v. The Earl of Sandwich*, 4 M. & G. 995, show that there is a general right possessed by all persons to make objections to a Crown Grant, although the Crown does not itself take the objection, and that a Court may, in determining the

rights of parties, be called upon to pronounce as to the validity of a Crown Grant in a suit to which the Crown is not a party, though it may not be able to set it aside absolutely as in a suit where the Crown is a party.

The question thus raised, moreover, cannot be considered without reference to "The Real Property Act of 1861," 25 Vic. No. 14, for, if the contention of the Plaintiffs be correct, many registered titles may be shaken at the will of any person choosing to impugn them. By section 15 of that Act the land in question, on being granted by the Crown, came under its provisions. The 33rd and 34th sections taken together enact that a Crown Grant or Certificate of Title or entry thereon shall be conclusive evidence in all courts of justice that the person therein named has the estate therein described, and the entry on six of the Crown Grants, of which Grimley was not grantee but transferee, states Grimley's estate to be an estate in fee-simple. Still further showing the intention of the Legislature as to the conclusiveness of the title thus registered, section 96 enacts that in any suit for specific performance brought by the registered proprietor of any land against a person who has contracted to purchase such land, the Certificate of Title of such registered proprietor shall be regarded as conclusive evidence of his title to such land. Should, however, the contention of the Plaintiffs be correct, the provisions of these sections may be defeated by allowing persons, in a proceeding to which the Crown is no party, to go behind the Crown Grant and show that it may be voided by the Crown because some illegal contract of the character alleged to have been made between Grimley and the selectors of the lands in question was made between the original grantee and the first transferee though the Crown may have waived the right of forfeiture. If such a course of proceeding is permissible, there is no saying after how many years such an objection to a Crown Grant *ex facie* valid might not be taken, nor how many titles shaken, knowing what we all know as matters of public notoriety, and what, as colonists acquainted with every-day topics of private and public discussion, we cannot altogether ignore when brought under our notice by counsel.

How far this Court has gone in holding that the title of a registered proprietor is indefeasible and cannot be impugned is clear from *Bailey v. Cribb*, Queensland L. J. 43. In that case the transfer for valuable consideration to the defendant upon which he obtained registration was, though unknown to him, a forgery. Notwithstanding this, Harding, J., held that the defendant's title as a registered proprietor in fee-simple was indefeasible, and the law so laid down in 1884 has never been questioned. The same view of the effect of registration was taken by the Supreme Court of New South Wales in *Phillips v. McLachlan*, 5 N.S.W.R. 168. In that case, on the 4th March, 1869, G conditionally purchased the land in question; on the 11th March, 1872, G transferred to defendant by notification to the land agent of the district. On 6th September, 1872, a Crown Grant was issued to G; and in 1880 the Sheriff sold under a *fi. fa.* all G's right, title, and interest to P; and subsequently in the same year P obtained a certificate of title. In 1881 P sold to W, to whom a fresh certificate

of title was issued. Later in the same year W sold to the plaintiff by memorandum of transfer indorsed on W's certificate. No fresh certificate of title was issued to the plaintiff. On these facts the Court held that the plaintiff was entitled to maintain an action for ejectment against the defendant, "notwithstanding," to use the words of the judgment, "the injustice which our so holding will inflict on the defendant, who is the rightful owner," the 33rd section of the Act being held as conclusive on the point.

We do not feel ourselves, however, called upon to pronounce judgment on the point taken as to the necessity of the Crown being a party, as in our opinion it is sufficient to say that the 4th section of the Crown Lands Alienation Act vesting in the grantee the lands described in the grants, and the grants and entries on the face of them under the provisions of the Real Property Act giving Grimley an indefeasible title, the presumption of legality at once arises, and the Queensland Board on the production of the grants was justified in assuming that if anything irregular had been done by Grimley or the selectors, that the Crown had waived such irregularity.

Granting that it was competent for the Chief Justice to hold the grants void in the absence of the Crown, it still appears to us that he was in error in overruling the demurrer and holding that upon the amended claim the Plaintiff Company was entitled to judgment because the contract made by the Defendants in lending money to Grimley on the mortgage security of the Crown Grants was illegal.

The determination of this question depends upon the construction which is to be placed on Section 21 of "The Crown Lands Alienation Act of 1876," which, as far as it is necessary to consider it, is in the following words:—

"No person shall become the holder of any land under conditional purchase or as a homestead who is, in respect of such land or any part thereof, an agent or a servant of or a trustee for any other person, or who has entered into any agreement, express or implied, to permit any other person to acquire such land by purchase or otherwise.

"And all land applied for by way of conditional purchase or as a homestead shall be for the *bona fide* use, occupation, and benefit of the applicant in his own proper person, and not as the agent, servant, or trustee of any other person.

"If any person shall, in violation of any of the provisions of this section, become the holder of any land under this Act, the Governor in Council may declare such land to be forfeited, and on proclamation of such forfeiture all right, title, and interest of the selector and of every transferee in and to such land, and all moneys paid in respect thereof, with all improvements thereon, shall be absolutely forfeited, and shall revert to the Crown.

"And all contracts, agreements, and securities made, entered into, or given with the intent, or which (if the same were valid) would have the effect of violating any of the provisions of this Act, and all contracts and agreements relating to land selected under the provisions of this Act made and entered into before or during conditional occupation to take effect on the fulfilment of conditions, or on the issue of a grant in fee-simple, shall be and are hereby declared to be illegal and absolutely void both at law and in equity."

Looking at the language of this section, and the provisions of the Act generally, it cannot be doubted that the intention of the Legislature was to prevent the acquisition of large areas of land direct from the Crown by capitalists through the means of sham selections made in the name of other persons,—in other words, by what is known as “dummying.” For this reason all contracts made with the intent of defeating the provisions of the Act as to *bond fide* selection, or which would have the result of so doing, are declared illegal, the words “which would have the effect” in our opinion meaning nothing more than “have the effect” of so doing, and simply making applicable to any dealing with conditionally purchased land the principle so often referred to in Criminal cases that a man’s intent shall be judged by the necessary consequences of his actions, by enacting that a contract which has the effect of defeating the object of the Legislature shall be regarded in the same light as one made with the avowed intent of so doing. Further than this we do not see that the Legislature had any intention of going. We cannot suppose that the Legislature intended to prevent the selector, previous to his obtaining his grant, making a contract to raise money by promising to pledge his grant as soon as he obtained it, provided that his honest intention in making the contract was simply to enable him to acquire and retain the land which the law authorised him to select. Supposing land to have been honestly selected by a *bond fide* selector anxious to obtain the land and make a home for himself upon it, and afterwards bad seasons came upon him and he found it difficult for a time to carry on the improvements necessary under the Act and to pay his way till better seasons came, it would be oppressive if he were not to be at liberty to make a contract pledging himself to any friend willing to advance him money on his personal security or upon a lien on his stock, that as soon as he obtained his grant from the Crown he would give him the further security of a mortgage. We cannot see anything in this section which forbids a transaction of that kind, nor can we suppose that the Legislature ever intended to place a selector under the disability of making an honest contract of that sort—a disability which would go far to defeat the policy of the Legislature in endeavouring to promote by the process of conditional purchase the settlement of freeholders upon the soil. It is true that the ultimate giving of the mortgage, if the selector was still further so hampered by bad seasons as to be unable to redeem his security, might result in a foreclosure much to his dissatisfaction, but it surely could not have been intended by the Legislature that because a contract of the kind might in the distant future have this result that it should be regarded as illegal though honestly made. Precisely the same result might follow if a selector simply borrowed money and made no agreement to give a mortgage over his selection when he obtained his grant. The result of the simple borrowing might be that when he was unable to pay up principal or interest at some future time judgment against him might be obtained in an action, and his selection sold by the Sheriff to satisfy the judgment, and at the sale the judgment creditor might buy the property. Yet if the contention of the Plaintiffs’ counsel is correct, though that money was lent

simply with the honest intention of enabling the selector to obtain the land for himself, or even in ignorance that he was a selector, it might be contended that as the effect of the contract of loan might ultimately be to enable the lender to acquire the land through the process of a sheriff’s sale, the contract to lend ought to be considered illegal. Only from clear and most unmistakable language could an intention be presumed on the part of the Legislature to deprive a selector of the common law right of borrowing money which he enjoys equally with the rest of Her Majesty’s subjects. Holding as we do, therefore, that the Legislature intended to do nothing more than to declare that the intent of a contract should be presumed from its direct and obvious consequences, we cannot regard the mere contract by a selector, before he has fulfilled his conditions, to give a mortgage over his selection when he has obtained his grant, as necessarily illegal, because the obtaining of the land by the mortgagee is not the natural and obvious or contemplated result of giving a mortgage. Thousands of mortgages are given every year where the last thing in the minds of the mortgagors or the mortgagees is sale or foreclosure. It is true that such a process of obtaining a selection might be resorted to as a means of defeating the Act, but if it is relied upon to defeat the validity of a mortgage, the intent must be proved *aliunde*, and cannot be presumed from the transaction itself.

The Act, it must be remembered, moreover, makes a contract of a dummying character not only illegal but highly penal, as section 102 renders anyone who shall “convey, transfer, or demise land acquired by any fraud upon the provisions of the Act, and any assignee with knowledge of such fraud” liable to a year’s imprisonment, and therefore the language which is to subject a person to the consequences of engaging in a criminal transaction must be of the clearest character, and must be strictly construed, especially where the transaction is only *malum prohibitum* and not *malum in se*. Applying the law thus laid down to the facts of this case, the question is whether the contract of mortgage which was entered into and which the Plaintiffs wish to have declared invalid, was so, as they allege in their amended claim. From the judgment of the Chief Justice it would appear as if he regarded the money lent to Grimley as really lent, as erroneously stated in paragraphs 10 and 13g of the claim, not after he had obtained the grants and upon their being pledged by him by way of mortgage, but before. We infer this from the passage in His Honour’s judgment in which he says, speaking of the loan for £9,870, “At that point they began to lend to Grimley, and they knew that the taint of illegality ran through the whole supposed titles in the hands of these selectors afterwards, and notably through Grimley, who was making that expenditure through the selectors.” The money, however, was not lent to Grimley, nor was it used, as His Honour would seem to imply, for the purpose of enabling Grimley to carry on the selectors as dummies, and to buy them out. At the time the money was lent by the Plaintiff Company, twelve months after Grimley’s application of 26th October, 1882, the grants had been actually obtained, and it was the contract under the mortgage which the Plaintiffs sought to set

aside. If there was any illegal contract made between Grimley and the selectors, and any money was used to carry it out, it was the money of the Queensland National Bank, and not the money of the Plaintiff Company, which was only used to cover the advances made to Grimley by the Bank. We do not think, as the counsel for the Plaintiffs contended, that a constantly recurring liability could arise *toties quoties* where loans from other lenders are used to repay old advances, even when the new advance is made with the knowledge of the lender of the purpose to which it is to be applied. If such were the law it would be impossible for one bank with any safety to take over the account of a customer of another bank if the customer was known at any time previous to have been engaged in dummied transactions. Whatever the character of Grimley's dealings with the selectors, the attempt to prove the contract of mortgage illegal under Section 21 fails, because, as we have pointed out, the natural effect of the mortgage was not to vest the selections in the Plaintiff Company, and there is no evidence *aliunde* that there was any such intent on the part of either Grimley or the Local Directors. It is true that the lands have got into the possession of the Plaintiff Company as mortgagees; but it is impossible to suppose, considering that the object of the Company is simply to advance money on mortgage, that Grimley ever intended that result when he asked the Queensland Directors whether they would lend on the security of deeds to be deposited with them, or that the Defendants ever contemplated obtaining the land for the Plaintiff Company.

This view of the law was taken by Owen, J., in *Hayward v. Smith*, 9 N.S.W.R. Eq. 11. The decision in that case depended on the construction of section 9 of the New South Wales "Crown Lands Amendment Act of 1875," which is almost identical in words with Section 21 of "The Crown Lands Alienation Act of 1876" of Queensland, as above set out. The facts in that case were as follows:—In April, 1882, J.S. became the conditional purchaser of certain lands under 25 Vic. No. 1 of New South Wales, and in 1884 he took up certain other lands as an additional conditional purchase. By mortgage and further charge dated respectively 29th April, 1886, and 3rd June, 1886, he charged these lands with the repayment to the plaintiff of £1,800. In September, 1886, the Sheriff, under a *fi. fa.*, sold all the right, title, and interest of J.S. in the said lands to the defendant for £50. At the time of the sale the defendant had notice of the deeds of mortgage and further charge. In 1887 the transfer of the lands from the Sheriff was lodged by the defendant. The plaintiff entered into possession under a power contained in his mortgage, and thereupon the defendant threatened to bring an action of ejectment. The plaintiff then instituted a suit to restrain proceedings at law, and to obtain a declaration that defendant held the lands subject to the said mortgage. Defendant demurred to the statement of claim on the ground of illegality of the mortgage. Owen, J., in overruling the demurrer, said: "While, therefore, carefully providing against 'dumming' by means of sham or fraudulent securities, the Legislature appears to have left to the conditional purchaser the right to give a *bond fide* security for *bond fide* advances. An equitable

charge on the land by the way of security is not a contract or agreement to take effect after the fulfilment of the conditions, but an actual charge which takes effect immediately when made, and which a Court of Equity would enforce, not by virtue of any contract or agreement to take effect after the fulfilment of the conditions, but because the charge was valid and subsisting, and because on the faith of such security the mortgagor had borrowed money. During the five years of residence the mortgagor could not transfer the land; but after the five years the Court of Equity would not allow the mortgagor to repudiate the security on which he had borrowed the money, and would compel him to make good the charge. If he attempted to sell the land freed from the mortgage, the Court would restrain him from so doing unless he gave effect to the charge. In this way, and to this extent, it appears to me that a conditional purchaser can give a valid security for a *bond fide* advance. The view of the law taken by Owen, J., was upheld on appeal by the Supreme Court of New South Wales, consisting of Darley, C.J., Windeyer and Foster, J.J., they being of opinion that neither section 9 of the New South Wales Act of 1875, nor section 121 of the New South Wales Act of 1884, which runs, "Every devise, contract, lease, agreement, or security made, entered into, or given before, at, or after the date of any application to make a conditional purchase, conditional lease, or homestead lease, with the intent, or having the effect, of enabling any person other than the applicant to acquire by purchase or otherwise the land applied for, shall be illegal and absolutely void, both at law and in equity," prevents the holder of conditionally purchased land giving a *bond fide* mortgage over it. In the language of the judgment of the Supreme Court of New South Wales, "a mortgage given *bond fide* is simply a pledge to secure the repayment of money advanced to the mortgagor, and is not to be considered as given with the intent to, or as having the effect of enabling the mortgagee to acquire the land comprised in the mortgage."

As to the cases relied upon by the Chief Justice, we do not agree with the decision of the Supreme Court of Victoria in *Commercial Bank of Australia v. Carson*, 6 V.L.R. 311, nor with so much of the judgment of Stawell, C.J., in *Plant v. Johnson*, 7 L.R. 457, as states that the object of the Legislature was "obviously to prevent a selector during the currency of his license from granting any security over his lands or obtaining any assistance to be paid for by any mortgage or security, whether it be effected during such currency or afterwards," preferring as we do to follow what appears to us the better reasoning upon which the judgment in *Hayward v. Smith* is based. *Plant v. Johnson*, moreover, does not apply, because there the promissory note sued upon was given to secure the performance of an agreement to hand over the lease when it should be issued, and it was proved that the indorsee had notice of the illegal agreement in pursuance of which it was given, and to allow an indorsee with notice to recover would be to allow an obvious mode of evading the Act. For the same reason *Chambers v. Chambers*, 2 Vic. L.R. Eq. 179, also cited by the Chief Justice, is inapplicable, as in that case the plaintiff and defendant entered into an agreement which was made with the obvious intent

of defeating the Act by allowing the defendant to be a trustee for the plaintiff, as Stawell, C.J., points out. Neither do we agree with *Byrne v. O'Callaghan*, 3 Vic. L.R. 924, as decided by the Supreme Court of Victoria. In that case *a Beckett, J.*, came to the conclusion, as a matter of fact, that the transaction sought to be impeached "was a simple loan in which the lender expected nothing more than a mortgage," and endeavoured to distinguish the case from *Plant v. Johnson*, on the ground that in that case the note was taken as a means of bringing pressure to bear to obtain land in contravention of the Act, a struggle evidently on the part of the learned Judge against the law as laid down in that case. Acting on this view he upheld the transaction, evidently taking the view subsequently taken by the Supreme Court of New South Wales that a *bond fide* mortgage was not illegal under the provisions of the Act. The Court, however, following *Commercial Bank of Australia v. Carson*, overruled him, simply because the mortgage in question was an equitable one, and therefore in the opinion of the Court within the words of the Section 21 of the Victorian Act of 1869, which is the same in its proviso as the New South Wales and Queensland sections, *in pari materia*. We may, however, add the authority of Mr. Justice *a Beckett's* opinion as that of a fifth judge supporting the view taken by four judges in New South Wales that a *bond fide* mortgage is not illegal though it may be given before the lease or grant is obtained. *Tooth v. Power*, L.R. 1 Ap. Cases 284, which the Chief Justice also relied upon, has no bearing on the present case as there no grant had been issued, and, therefore, no presumption arose as to the waiver of forfeitures. The case simply confirms the view taken by the Supreme Court of New South Wales that a contract made in order to enable a person to acquire land by the performance of the conditions of residence and improvement through another person—in other words, by a dummy—was illegal and one that could not be enforced in equity under the Crown Lands Act of New South Wales, which is similar in its provisions to the Queensland Act.

Grimley's letter of the 26th October, 1882, in which he first asks the Plaintiffs whether they would lend him money, is in these words: "I am anxious to secure about 13,000 acres in the parish of Cumkillinbar, near Dalby, for which I will have to pay in all about 35s. per acre, including improvements of at least 10s. per acre; they are continuous and mostly in blocks of 1,200 acres, which I propose to buy as opportunity offers, and I have therefore to ask, in the event of my doing so, if your Company will be prepared to advance me 25s. an acre on the security of the deeds on such lands as I may deposit them with you." This letter, it will be seen, so far from asking the Plaintiffs to lend money for the purpose of dummieing, informs them that he is simply contemplating purchasing certain lands as opportunity offers, and wishes to know whether the Plaintiff Company at some future time would be prepared to advance on the title deeds of such lands when he had purchased them. Supposing that what took place between Grimley and the Local Directors constituted a contract, if, indeed, looking at the vagueness of the proposition as to the time when the money might be required, the undefined character of the securities which were to be approved, and the absence of any consideration moving from Grimley, it could mean anything more

on the part of the Directors than an expression of willingness to do business with him (see *Rogers v. Challis*, 27 Beav. 175), it cannot be argued that it was a contract entered into with the intention of defeating the Act, nor that it was one which had that effect within the meaning of Section 21, as the Directors could not know that such would be its natural and obvious effect. The contract, however, which the Plaintiffs are seeking to impeach, is not any contract previous to the mortgage, but the mortgage itself, and this, for the reason which we have given, cannot be held invalid either by reason of any illegality attaching to the transaction of mortgage itself, or by reason of any contract if there was one entered into previously with Grimley and the other Defendants.

Looking, moreover, at the object which the Legislature seems to have had in view and the language of Section 21, we are of opinion, construing the section strictly as we must, that it only refers to contracts made with the selector himself, and has no reference to contracts between other people. There are no words indicating that such contracts are referred to, and we think the language of the section cannot be so stretched as to make it apply to contracts other than those made with the selector. The first paragraph of the section simply provides that no person shall become the holder of the conditional purchase who directly or indirectly is to hold for the benefit of another person. The second paragraph, which ought logically to come first, enacts that all land applied for as a conditional purchase shall be for the *bond fide* use of the applicant. The third paragraph provides that if any person in violation of these provisions becomes a holder of a conditional purchase the interest of such holder or of his transferee shall be forfeited. The fourth paragraph, to give effect to these foregoing provisions relative to holders, applicants, and transferees, provides that any contracts made to defeat the previous provisions of the section shall be illegal. The words "all contracts and agreements relating to land selected under the provisions of this Act made and entered into before or during conditional occupation to take effect on the fulfilment of conditions or on the issue of a grant in fee-simple shall be and are hereby declared to be illegal and absolutely void both at law and in equity," at the end of Section 21, must, we think, be construed as meaning contracts *ejusdem generis* with those indicated in the preceding part of the section, and not any possible contract, for if that was the construction the absurd result would follow that a contract made before the completion of the conditions by a selector for the building of a house on his selection after he had obtained his grant would be illegal. It appears to us clear, therefore, that the contracts which the Legislature intended to guard against were contracts made with holders or applicants, as it would only be by means of such contracts that the provisions of the section could be defeated, no contract with any third party being capable of defeating the provisions of the section unless an applicant for or the holder of the conditional purchase were a party to it. This was the view taken by *Owen, J.*, in *Horsley v. Ramsey*, 10 N.S.W.R. 41. In that case certain vendors sold to the plaintiffs a pastoral property, on which was a selection over which the vendors had no control, and the conditions of which had not been

fulfilled at the time of selling the station. The vendors guaranteed the fulfilment of the conditions and the transfer of the selection on completion. The selection being forfeited owing to non-fulfilment of conditions, and consequently not transferred to the vendors, it was held in a suit against the vendors for damages for not transferring to the purchasers that the guarantee was not illegal within the section of the New South Wales Land Act identical with Section 21. In his judgment Owen, J., says, "I am clearly of opinion that the contracts referred to in that section are contracts with the selector himself; indeed, that is the only possible way of reading the section." If it is suggested that such a reading of the section might enable the intentions of the Legislature to be defeated, it is enough to say *quod voluit non dixit*. Probably the Legislature thought that the section, though thus construed, would suffice in the great majority of cases to defeat collusive agreements against the policy of the Act, and that it would be dangerous to expose the transactions of business men and banking institutions to the risk of litigation, which would cramp the operations of legitimate financial enterprise.

The construction put upon the section by us fully carries out the intentions of the Legislature, and as Holroyd, J., points out in *Edwards v. Dick*, 4 B. & Ald. 212, "The rule of law is, that the words of a Statute are not to be construed so as to extend beyond the mischief contemplated by the Act, where such construction would be injurious to the interest of third persons." The decision in that case proceeded upon the construction of 9 Anne c. 14, s. 1, which enacted that "all notes, mortgages, or other securities executed by any person, where the whole or any part of the consideration of such security should be for money won by gaming, shall be void to all intents and purposes whatever." The Court, however, held that a bill given to pay a gaming debt which had passed into the hands of a third person for valuable consideration in payment of a *bona fide* debt could be sued upon, and that the bill was only void for every purpose and those purposes only which it was the object of the Statute to prevent. For these reasons we are of opinion that the Chief Justice was wrong in overruling the demurrer, and that our judgment upon it must be for the Defendants.

From the judgment of the Chief Justice the Defendant Grimley appealed so far as the costs against him were concerned on the ground that, inasmuch as he had offered to submit even before trial to a judgment for the amount due to the Plaintiff Company, together with interest at the rate of 7 per cent., and had again made the same offer at the trial on the opening of the case, which having been refused, he had succeeded in defeating the Plaintiffs' claim for interest at 9 per cent., and had thus succeeded in defeating the Plaintiff Company as to the only matter in contention between them, he ought not to be saddled with all the heavy costs consequent upon a trial lasting fifty-six days to the expense of which he had been put by the refusal of the Plaintiffs to accept his offer and their subsequent attempt to destroy his title under the Crown Grants. To the argument of the Plaintiffs that they were entitled to a judgment for the amount of the debt owing, subject to an account, there is of course no answer. As the Plaintiffs, however, have been defeated on the material points

in dispute with Grimley, the difference on which necessitated Grimley's presence, their defeat shows that they ought to have accepted the offer made by him to submit at once to judgment for the amount claimed with interest at the rate of 7 per cent. It must be remembered, moreover, that Grimley having admitted his indebtedness to the Plaintiff Company upon the face of the pleadings, the Plaintiff Company might, under Order 39, R. 11, have moved for judgment. Grimley moreover appears to have been served with the amended claim, which virtually called upon him to defend his title under the Crown Grants; and as he has also defeated the Plaintiffs upon the issue thus raised by them—one of greater importance to him even than the question of interest, itself involving a sum of no less than £7,000—we think he is entitled to his costs from the time when he made his offer to submit to the very judgment which both the findings of the jury and even the judgment of the Chief Justice show that the Plaintiff Company was only entitled to from the first. Where the action is tried by a jury the costs follow the event, Order 54 Rule 1, "unless for good cause shown on application made at the trial the Court shall otherwise order." The Plaintiff Company succeeds in getting judgment for the money due, and under ordinary circumstances would get the costs of the action. It has been decided, however, that not only can the Court deprive a successful party of his costs but it may order him to pay the costs of his opponent, where the action is unfounded, unnecessary, or oppressive, or where the conduct of the case has been unjustifiable or otherwise improper. *Fane v. Fane*, L.R. 13 Ch. D. 228. Here an application was made at the trial by the Defendant's counsel for an order depriving the Plaintiff Company of the costs, and for payment by it of the Defendant's costs. The learned Judge did not decide that there was no good cause shown, but ultimately gave costs against the Defendant. We think that His Honour should have made the order asked for. In our opinion, not only was there a disingenuous attempt by the Plaintiffs to damage and destroy their own securities, but the Defendant was unnecessarily kept in the trial and forced to remain there to the very end. By this course his costs were unnecessarily increased and a burden placed upon him which he ought not to have borne. *Huxley v. West London, &c., Co.*, L.R. 14, Ap. Ca. 26. The Plaintiff Company, however, is entitled to costs up to the time of the Defendant's offer to consent to judgment. In respect of these we propose to allow £100 as ample to satisfy them on the very simple case of debt which they were entitled to bring against him. As regards the remainder, we think that not only should the Plaintiff Company be deprived of them, but that they should be ordered to pay the Defendant all his costs of the action subsequent to the joinder of issue, including the demurrer and motion for judgment. The Defendant will also get his costs of this appeal, and there will be judgment accordingly.

The result of our conclusion that there was nothing in the dealings of the Queensland Directors with Grimley that was illegal is, that they are not answerable for negligence to the Plaintiffs, as the Chief Justice decided. Supposing, however, the strictly legal aspect of the dealings with Grimley to be what the learned Chief Justice thought, there is no doubt in our minds that any

solicitor in the Colony would have advised the Directors, as their solicitor did, that they were justified in lending on the security of the Crown Grants. If such a title is not to be accepted as good without investigation (and what the character of that investigation by conveyancers should be, it is difficult to see, the selectors having already sworn to the performance of the conditions before certificate granted), conveyancing in a country where every title starts from a Crown Grant made but a few years ago would be almost paralysed, and no one would feel safe in the possession of his property.

In this case the jury have found that the Queensland Directors were guilty of no negligence making them responsible to the Plaintiff Company, and have acquitted them of all the indirect motives charged against them in the original claim, finding that they lent the money to Grimley believing that the land was ample security for the money advanced, and with no other intention than that of serving the interests of the Plaintiff Company, as they were in honour bound, and as their interests as large shareholders in the Company would naturally prompt them to do. To the findings of the jury in favour of the defendants on all such points not only has no objection been taken, but it is admitted by the counsel for the Plaintiffs that there is evidence to maintain them, which, we may add, is in our opinion so ample and conclusive as to leave no doubt whatever on our minds that the findings of the jury on the original case were correct. Adopting those findings as we do, and using the language of Kay, J., in *The Faure Electric Accumulator Company, L.R. 40 Ch. Div. 153*, "Anything like corruption or dishonesty on the part of the directors being out of the question, they cannot be treated as responsible for the consequences" of the shrinkage in value of securities which has taken place in the Colony to an unprecedented extent. Our judgment must therefore be for the Defendants other than Grimley on the entire case.

These Defendants having succeeded on the whole case must, according to the general rule laid down in Order 54, Rule 1 (that where the action is tried by a jury the costs shall follow the event), and the authority of the case cited by His Honour, *Cooper v. Whittingham, L.R. 15 Ch. D. 501*, get their entire costs of the action. This will include the costs of all the interlocutory proceedings, the commission, and the demurrer. They will also get the costs of this appeal, and we think, having regard to the importance and magnitude of the case, the length of time occupied in the hearing—fifty-six days—and the mass of evidence taken, that the Defendants should be allowed the costs of all their counsel on the trial, the demurrer, the motion for judgment, and on the appeal.

This judgment has extended to some length, but, apart from the number of questions to be dealt with, the nature of the interests at stake seemed to us to demand that we should, in view of the possibility of an appeal from our decision, do all we could to put their Lordships of the Privy Council in possession of those facts of the case which must, for the understanding of it, be picked out of a mass of evidence, much of which is immaterial for the determination of the real questions at issue, and with respect to which their Lordships would not have the assistance of counsel thoroughly conversant with

the case from the commencement of proceedings, who have on both sides made all the frank admissions as to the nature of the evidence and its sufficiency in particular to sustain the findings of the jury on the original case that we might expect from gentlemen entrusted with the conduct of an action involving interests of such magnitude.

The following will be the formal judgment of the Court to be entered upon the whole record:—

1. Vacate the judgment of the Chief Justice, and restore the findings of the jury on the original case and substitute—

2. Judgment for the Plaintiff Company against the Defendant Grimley for £61,000, with interest thereon at the rate of 7 per cent. per annum from date of writ to judgment, subject to an account to be taken of what is due to the Plaintiff Company for principal and interest on their bills of sale and mortgages in the pleadings mentioned, such interest to be calculated at the rate of 7 per cent. from January, 1886, and the sum of £100 for the Plaintiff Company's costs of the action.

3. The Defendant having made application at the trial and shown good cause therefor, order that the costs shall not follow the event, and, except as to the sum of £100 aforesaid, deprive the Plaintiff Company thereof, and further allow the Defendant Grimley his costs of the action, as from the joinder of issue, and of the demurrer and of this appeal.

4. The Defendant Grimley's costs to be set off against the amount certified to be due to the Plaintiff Company for principal, interest, and costs, as aforesaid, and judgment to be entered for the Plaintiff Company for the balance.

5. The Plaintiff Company to release the mortgages and deliver up the title deeds to the Defendant upon payment by Grimley of such balance within one month after certificate.

6. Judgment on the whole case for the Defendants Drury, McIlwraith, Palmer, and Hart, with costs of the action throughout, of all interlocutory proceedings, the demurrer, and of this appeal. All counsel to be allowed.

THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LIMITED, *v.* GRIMLEY AND OTHERS.

This was an application, by motion on petition, by the Plaintiff Company for leave to appeal to the Privy Council against so much of the judgment of Sir Charles Lillie, C.J., delivered on the 10th day of August, 1892, as directed judgment to be entered for Defendants Edward Robert Drury, Sir Thomas McIlwraith, Sir Arthur Hunter Palmer, and Frederick Hamilton Scott Hart, as to an alleged loss of £2,000 arising from their not taking a second mortgage on the South Brisbane property of the Defendant Samuel Grimley.

This judgment, it was admitted, was respecting one item of demand in an action in which a much larger sum was claimed by way of damages, and in which the Plaintiffs had succeeded, and against which judgment the four Defendants named were appealing to the Full Court. It was further admitted by counsel for the Plaintiffs that the whole case was so interlaced with this item of £2,000 that this part of it could not be considered without considering the whole. The application

was opposed by the Defendants, on the ground that the judgment from which the Plaintiffs wished to appeal was not a final judgment of the Court within the meaning of Her Majesty's Order-in-Council of the 16th June, 1860; and secondly, that before appealing, the Plaintiffs should have asked this Court, by way of appeal, either to grant a new trial in respect of the matter as to which the judgment was said to be erroneous, or to enter judgment for the Plaintiffs upon the facts disclosed in evidence at the trial. The Plaintiff Company has undertaken, for reasons which need not be gone into here, not to proceed further on appeal to the Privy Council in this matter separately, but we have been asked to give judgment for the purpose of determining the question of costs, which depends on the right of the Plaintiffs to make this motion. It is argued on behalf of the Plaintiffs that the judgment of a single Judge trying an action under section 6 of the Judicature Act, 40 Vic. No. 6, is a final judgment so long as it stands, a final judgment being a judgment which finally settles the matter between the parties if given either way, the test recognised as correct in *Salaman v. Warner*, 1 Q.B. Div. 1891, 734.

On the other hand it is urged that it is not a final judgment of the Court until the time for appealing to the Court has elapsed, and that, inasmuch as the judgment in the action was appealed against by the Defendants, the judgment of the Judge of first instance never became a final judgment of the Court.

The real question, however, it seems to us, is whether the judgment in question is a final judgment of the Court as contemplated by the Order-in-Council of 1860, which it must be remembered was issued before the present system of trial under the Judicature Act came into force, and at a time when the judgment following upon the verdict of a jury could in no way have been regarded as a final judgment of the Court. The counsel for the Plaintiffs in his argument before us seemed prepared to admit that the judgment of the Judge under the present system is really only the equivalent of the judgment under the old system, and he was driven to contend that a plaintiff would have been at liberty to appeal direct to the Privy Council on a judgment following upon a verdict at *nisi prius*. Such a contention appears to us unarguable, and we can no more regard the judgment of a Judge of first instance trying a case under the present system as a final judgment within the meaning of the Order-in-Council, than a judgment under the old system following upon a verdict.

Though the argument *ab inconvenienti* is not one to which weight should be given sufficient to override the language of a Statute or Order-in-Council if plain, yet, coupled with the fact that the Order-in-Council was never intended to deal with judgments of the kind now in question, it is of such importance that it cannot be passed over in considering whether a judgment of the Judge of first instance is to be regarded as a final judgment of the Court within the meaning of the Order-in-Council.

The consequences following upon such a reading of the Order-in-Council are altogether too far-reaching and inconvenient to allow of its adoption.

The result would be that an action might be tied up by an appeal to the Privy Council from the direction of a Judge, or upon some simple question as to the admissibility of evidence which this Court could determine without difficulty, often without argument, and months might be lost before the Privy Council determined the matter, during which time parties might die and evidence be lost. The further inconvenience, moreover, might arise, as in this case, that one side might appeal to the Full Court on the general merits of the case, whilst the other appealed to the Privy Council on some comparatively unimportant portion, but which was so interlaced with the rest of the case that it could not be considered without considering the case as a whole. The possible result might be the direction of a new trial by the Privy Council, and, clashing with it, a final judgment of this Court dealing with the whole matter under Order 57, Rules 3 and 6, in such a way as made the view taken as to the particular matter on which an appeal went to the Privy Council immaterial. The Plaintiff Company's counsel, moreover, avowed that he thought that the effect of such right as he claimed would necessarily be to stay the Defendant's appeal to this Court, and that not only must this Court hold its hand and delay the exercise of its undoubted jurisdiction, but that the Defendants would be bound to follow him to the Privy Council and there litigate their rights by a cross-appeal. The avowal of such a contemplated result shows how impossible it is to admit a construction of the Order-in-Council which might lead to a result so unfair and possibly oppressive. It clearly never could have been intended by the Legislature in framing the orders as to appeals that the right of appeal given to the Full Court should be intercepted, perhaps virtually defeated, by an appeal to the Privy Council on some subordinate point; and the fact that no such motion as this has ever been made before in this Court, and that no English precedent can be cited for allowing it, goes far to prove that the judgment of a Judge of first instance, though for the purposes of a trial he constitutes the Court, has never been regarded as a final judgment of the Court within the meaning of the Order-in-Council.

The argument founded upon the inconvenience of allowing a party to appeal to the Privy Council before he has exhausted the remedies given to him by the orders and practice of the Court below was given effect to by the Privy Council in *Dagnino v. Bellotti*, L.R. 2 Appeal Cases 604. In that case as here, the petitioner asked leave to appeal on the ground that the verdict was against evidence. Their Lordships, in refusing leave to appeal to the Privy Council on the ground that the petitioner ought in the first instance to have appealed to the Court below, say, "It would be very inconvenient if parties, without moving the Court for a new trial, could be at liberty to ask Her Majesty in Council to set aside the judgment upon the ground that the verdict was wrong, without having taken that course which is pointed out by the rules made in pursuance of the charter to be adopted in the case of an objection to a verdict."

For these reasons we are of opinion that the application for leave to appeal must be refused, with costs.

THE QUEENSLAND MORTGAGE AND INVESTMENT COMPANY
VERSUS
GRIMLEY AND OTHERS.

COPY OF THE QUESTIONS REFERRED TO THE JURY BY THE CHIEF JUSTICE,
WITH THE ANSWERS OF THE JURY THERETO IN PARENTHESES, AND THE
SUBSEQUENT ANSWERS OF THE CHIEF JUSTICE NOT IN PARENTHESES.
COPY OF THE JUDGMENT OF THE CHIEF JUSTICE ON THE CASE.

1. Were the defendants other than Grimley appointed by the plaintiffs to act as their agents and managers in Queensland under the name or style of the local directors?—(Answer: Yes; as local directors.)

Yes; as local directors.

2. (a) Did the defendants, the local directors, receive from time to time instructions from the plaintiff's directors in London as to the manner of performing their duties, and in particular were they instructed not to advance moneys by way of loan except upon good and sufficient security?—(Answer (a): Yes.)

Yes.

(b) Was that to be after an independent valuation of the proposed security?—(Answer (b): Yes, except as in 2 (c).)

Yes, except as in 2 (c).

(c) And were the defendants authorised by the plaintiff's directors in London to dispense with an independent valuation where the proposed securities were known to the local board?—(Answer (c): Yes.)

Yes.

(d) Were the securities in question so known to the local board?—(Answer (d): Yes.)

Yes.

And (e) were they not to advance any moneys upon properties in which these defendants were directly or indirectly interested?—(Answer (e): Yes; directly, and subsequently indirectly, Oct., 1883.)

Yes.

3. Did the defendants, the local directors, between October, 1882, and April, 1883, or before the commencement of this action, authorise the making of certain loans from the funds of the plaintiff to the defendant Grimley, and were the advances made by the authority aforesaid?—(Answer: Yes.)

Yes.

4. (a) Have full particulars of the money lent by the plaintiffs to the defendant Grimley, and of the interest accruing due thereon, been furnished from time to time by the plaintiffs to the defendant Grimley?—(Answer (a): Yes.)

Yes.

And (b) has he from time to time admitted the correctness of the said accounts, and on the 26th November, 1888, was the sum of £66,264 8s. 2d. due and owing by the defendant Grimley to the plaintiffs in respect of the money so lent by the plaintiffs to the defendant Grimley and the interest thereon?—(Answer (b): No; amount owing subject to account being taken.)

No; I find the sum of £66,264 8s. 2d. due and owing by Grimley to the plaintiff company subject to an account being taken.

And (c) have full particulars of such sum been furnished to the defendant Grimley?—(Answer (c): Yes.)

Yes.

5. Is the sum of £66,264 8s. 2d., together with interest thereon from 26th November, 1888, now due and owing by the defendant Grimley to the plaintiffs?—(Answer: Yes; subject to account.)

Yes; subject to account.

6. Did the defendant Grimley, in October, 1882, apply to the other defendants as local directors of the plaintiff company for a loan of £16,250 for three years at 8 per cent., to enable him to purchase 13,000 acres of land in parish of Cumkillenbar, near Dalby, being at the rate of £1 5s. per acre of the said land?—(Answer: Yes.)

Yes.

7. Did the defendants, the local directors, authorise the said advance, and did they thereafter from time to time before December, 1884, make advances to the defendant Grimley from the plaintiff's funds to the extent of £16,972 10s. upon the security of 12,778 acres of the said land?—(Answer: Yes.)

Yes.

8. (a) Did the defendants, the local directors, on August 13, 1885, authorise and shortly afterwards make a further advance of £7,768 to the defendant Grimley?—(Answer (a): Yes.)

Yes.

If so (b) how was such advance made up?—(Answer (b): 5s. per acre on 12,778 acres, and 30s. per acre on 3,049 acres.)

5s. per acre on 12,778 acres, and 30s. per acre on 3,049 acres.

9. Had the defendant Grimley been the accountant of the firm of Bell and Sons?—(Answer: Yes.)

Yes, and has so continued for a period of over 30 years.

10. (a) Had the said lands, in respect of which the defendant Grimley applied for the advance aforesaid, and on the security whereof the defendants, the local directors, authorised the same, been before the selection and purchase thereof from the Crown part of the station of Jimbour, the property of Bell and Sons, as originally leased from the Crown?—(Answer (a): Yes.)

Yes.

And (b) had the said lands been acquired as conditional selections under the Crown Lands Alienation Act of 1876?—(Answer (b): Yes.)

Yes.

And (c) had Sir J. P. Bell or Bell and Sons advanced to the persons selecting the said lands for the purpose of making the necessary improvements thereon sums amounting to 10s. an acre for which no security was held by Sir J. P. Bell or Bell and Sons?—(Answer (c): Yes, 10s. per acre, more or less.)

Yes, 10s. per acre, more or less.

And (d) had the Darling Downs and Western Land Company, Limited, since the time of making the lastmentioned advances, purchased and become the owners of Jimbour estate?—(Answer (d): Yes.)

Yes.

11. (a) Were the 12,778 acres and the said 3,049 acres so situated as not to be capable of being used as one property otherwise than as part of Jimbour estate?—(Answer (a): No.)

No.

And (b) did the defendants, the local directors, know that the said lands were so situated?—(Answer (b): No.)

No.

And (c) was the defendant Grimley or was he not purchasing the said lands for the purpose of using the same or as an investment for his own benefit, but had he applied for the said advances to enable him to purchase the same?—(Answer (c): Yes; for his own benefit.)

No; he was acquiring them for Bell and Sons, and had applied for the advances for that purpose.

And (d) was he purchasing the same solely for the purpose of securing to the estate of Sir J. P. Bell, or Bell and Sons, the repayment of all sums advanced to the selectors of the said lands and of securing the said lands to the Darling Downs and Western Land Company, Limited, if at any time that company should desire to purchase the same from the defendant Grimley at the cost price thereof?—(Answer (d): No.)

He was purchasing for Bell and Sons to secure the repayment of Bell's advance of £9,870, and for the fuller benefit of Bell and Sons.

If so (e) did the defendants, the local directors, know the circumstances lastmentioned in (c) and (d) or either of them?—(Answer (e): Not agreed.)

Yes.

11. (A) Is it a fact that the said lands in paragraphs 9 and 10, and the 12,778 acres in paragraph 11 of the statement of claim mentioned, were not applied for by way of conditional purchase by the persons applying for the same respectively for the *bond fide* use or occupation or benefit of the said applicants or any of them in their or any or either of their own proper persons, but as servants or agents of or as trustees for the said Sir Joshua Peter Bell or as servants or agents of or as trustees for the said firm of Bell and Sons?—(Answer: Not agreed.)

It is a fact, and they were "dummies"—and acting in violation of the Act of 1876 (Crown Lands Alienation Act).

11. (B) Had the said persons so selecting the said lands as aforesaid entered into agreements express or implied to permit the said Sir Joshua Peter Bell or the said firm of Bell and Sons to acquire the said lands by purchase?—(Answer: Not agreed to.)

They had to permit Bell and Sons to acquire.

11. (C) Had the said persons so selecting the said lands as aforesaid entered into agreements express or implied to transfer the same to the said Sir Joshua Peter Bell or to the said firm of Bell and Sons or to permit the said Sir Joshua Peter Bell or the said firm of Bell and Sons to otherwise acquire the said lands?—(Answer: Not agreed to.)

They had to permit Bell and Sons to acquire.

11. (D) Is it a fact that after the death of Sir Joshua Peter Bell, which took place in the month of December, 1881, the said several persons selecting the said lands did not use or occupy the same *bond fide* for their or either of their own use or occupation or benefit, but as the servants or agents of or as trustees for the said Samuel Grimley, or as servants or agents of or as trustees for the said firm of Bell and Sons and each and every of the said persons were in respect of the said lands selected by them the servants or agents of or trustees for the said Samuel Grimley or the servants or agents of or trustees for the said firm of Bell and Sons?—(Answer: Not agreed.)

They did not use or occupy the lands *bond fide* for their own benefit, but were servants or agents for Bell and Sons through Grimley, and were acting in violation of "The Crown Lands Alienation Act of 1876."

11. (E) Is it a fact that after the death of the said Sir Joshua Peter Bell, as aforesaid, the said several persons selecting the said lands had entered into agreements, express or implied, to permit the said Samuel Grimley or the said firm of Bell and Sons to acquire such lands by purchase?—(Answer: Yes, Grimley; but no satisfactory evidence as to date, whether before or after issue of title by the Crown.)

Yes; Grimley for Bell and Sons, or Bell and Sons through Grimley.

11. (f) Is it true that after the death of the said Sir Joshua Peter Bell, as aforesaid, the said several persons selecting the said lands had entered into agreements, express or implied to transfer the said lands to the said Samuel Grimley or to the said firm of Bell and Sons, or to permit the said Samuel Grimley or the said firm of Bell and Sons to otherwise acquire the said lands?—(Answer: No, as in answer 11 (e).)

Yes; to Grimley for Bell and Sons, or Bell and Sons through Grimley.

11. (g) Is it true that the said 12,778 acres of land in paragraphs 9, 10, and 11 (of the statement of claim hereof) were at the time in the said paragraphs respectively mentioned comprised in conditional selections under the provisions of the Act aforesaid, in respect of which the condition of occupation had not been fulfilled in accordance with the provisions of the said Act, and in respect of which no deeds of grant for an estate in fee simple had been issued by the Crown?—(Answer: Yes, as regards paragraphs 9 and 10 only.)

It is true.

11. (h) Did the defendants or any and which of them know the circumstances mentioned in the immediately preceding questions 11 (a), 11 (b), 11 (c), 11 (d), 11 (e), 11 (f), 11 (g), or those mentioned in any and which of the said questions, before and at the times the loans on the salmon-coloured selections were made to Grimley?—(Answer: Yes, 11 (e), and, except Hart, 11 (g).)

They did know.

11. (i) Did the plaintiff company with full knowledge of the said circumstances acquiesce.—(Answer: No answer.)

No.

12. (z) Were the said advances at the rate of £1 10s. per acre equal to and in some cases greater than the total amount paid by the defendant Grimley to the several vendors of the said land as to purchase money thereof?—(Answer (a): Yes.)

Yes.

And (b) did the defendants know this?—(Answer (b): Yes.)

Yes.

And (c) did the defendants, the local directors, make these advances to enable the defendant Grimley to make such payments?—(Answer (c): Yes.)

Yes.

13. (a) Have the said lands ever been used by the said defendant Grimley?—(Answer (a): No personal occupation.)

No; except by letting them to the Darling Downs and Western Land Company.

And (b) have the said lands ever since the purchase by the defendant Grimley been used by the Darling Downs and Western Land Company, Limited, as part of the estate or station of Jimbour?—(Answer (b): No.)

No; except in the short period of letting.

And (c) had the said company erected fences so as to enclose part of the said land for their convenience with other parts of the said estate?—(Answer (c): Yes; in pursuance of contemplated exchange.)

Yes.

And (d) has the said company ever paid any rent for the said lands other than for a portion thereof for and in the year 1885, and then at the rate of 6d. an acre only?—(Answer (d): No.)

No.

15. (a) Were the said advances or either of them made *bonâ fide* for the benefit of the plaintiffs or made in the interest and for the benefit of the estate of Sir J. P. Bell or Bell and Sons?—(Answer (a): Yes; for *bonâ fide* benefit of the plaintiffs.)

No; in the interest of Bell and Sons through Grimley.

Or (b) for the benefit of the Darling Downs and Western Land Company, Limited?—(Answer (b): No.)

No evidence of it; no.

16. (a) Were the said lands a grossly, or, if at all, to what extent, an insufficient security, apart from the question of dummyming or illegality, for the said advances or either of them?—(Answer (a): No.)

They were altogether insufficient on the ground of dummyming. They were worthless to the plaintiff company, being illegally gotten.

And (b) did the defendants, the local directors, know, or ought they to have known, or could they with the exercise of reasonable care have known the insufficiency of such security?—(Answer (b): No.)

They knew, and anyone with reasonable care could have known from the sources of knowledge in the possession of the local directors.

And (c) did they exercise reasonable care in making the said advances or either of them apart from the question of dummyming or illegality?—(Answer (c): Yes.)

No.

And (d) did they procure any valuation to be made of the said lands?—(Answer (d): Local board valued.)

Not an independent valuation; the local directors valued.

And (e) did they with full knowledge of the facts aforesaid and without any inquiry as to the real value of the said lands lend the plaintiff's money on the security thereof without obtaining any security for the said money from the person for whose benefit the said lands were to be purchased with the plaintiff's said money?—(Answer (e): No.)

Yes.

17. (a) Did the defendants, the local directors, on the 25th day of January, 1883, authorise a loan to the defendant Grimley from the funds of the plaintiffs of £7,000 at 9 per cent. per annum?—(Answer (a): 25th January; Yes.)

Yes.

And (b) was the said sum so advanced to Grimley on the security of a mortgage of 3,144 acres of land situated in the Bunya Mountains, near Dalby, and certain sawmill plant?—(Answer (b): Yes.)

Yes.

And (c) was £4,500 of the said sum of £7,000 shortly afterwards advanced on the security of the said land, and the balance of the £7,000 as the said mill was erected?—(Answer (c): Yes.)

Yes.

17. (A) Is it true the said 3,144 acres of land in paragraph 19 of the statement of claim mentioned were at the times in the said paragraph mentioned comprised in a conditional selection under the provisions of the Act aforesaid in respect of which the condition of occupation had not been fulfilled in accordance with the provisions of the said Act, or in respect of which no deeds of grant for an estate in fee-simple had been issued by the Crown?—(Answer: Yes.)

Yes.

17. (B) Did the defendants know the circumstances last mentioned or any of them and which before or at the time all the loans were made to Grimley?—(Answer: Yes, except Hart.)

Yes.

17. (C) Did the plaintiff company with full knowledge acquiesce?—(Answer: Yes; all material information sent to head office in usual course.)

No.

18. (A) Did the defendants, the local directors, inform the plaintiff's London board that they the said local directors had authorised the loan of £7,000, that the said land was valued at £2 per acre?—(Answer (a): Loan advised. As to value, no.)

The loan was advised; but as to value, no.

And (b) was such value put upon the said land by defendant Grimley?—(Answer (b): No.)

No.

And (c) did the defendants, the local directors, themselves procure a valuation of the said land?—(Answer (c): Local board valued.)

The local directors valued.

And (d) had the same then been recently purchased by the defendant Grimley for less than £7,000?—(Answer (d): Yes.)

Yes.

And (e) was the defendant Grimley a man of small means and with no experience in the business of a sawmill proprietor?—(Answer (e): Yes, comparatively so.)

Yes; for such an enterprise, if undertaken with his own means.

And (f) did the defendants, the local directors, well know the facts aforesaid that the defendant Grimley was secretary to the Darling Downs and Western Land Company, Limited.—(Answer (f): Yes.)

Yes.

And (g) did they inform the plaintiff's London Board of the said facts?—(Answer (g): Not agreed.)

No.

19. Did the defendants, the local directors, on or about the 30th August, 1883, grant a further advance to the defendant Grimley of £2,200 at £10 per cent. per annum, out of the plaintiff's funds without any further security than the said last-mentioned land and mill plant?—(Answer: Yes; and securities already held.)

Yes; except that all the securities were to be collateral.

20. (a) Was the defendant Grimley, at or before the time of making the two last-mentioned advances largely and, if at all, to what extent indebted to the Queensland National Bank?—(Answer (a): Yes, about £6,000.)

Yes, about £6,000.

And (b) did he require a large or any and, if any, what part of the said advances in order that he might apply the same, and with the intention of applying the same in payment or part payment of his said indebtedness?—(Answer (b): Yes, about £6,000.)

Yes, about £6,000.

And (c) did the defendants, the local directors, well know that fact?—(Answer (c): Yes.)

Yes.

And (d) did the defendant Grimley, with the knowledge and approbation of the defendants, the local directors, so apply the said advances of £7,083 18s. 8d. or any part thereof?—(Answer (d): No answer.)

I believe so.

21. (a) Did the defendants, the local directors, in the month of October, 1883, grant to the defendant Grimley out of the funds of the plaintiffs a further loan of £5,500?—(Answer (a): Yes.)

Yes.

And (b) if so, was such loan granted for the alleged purpose of paying for 3,626 acres of land adjoining the property then used by him as a mill?—(Answer (b): Yes.)

Yes.

And (c) was the said loan made upon the security of the said 3,626 acres?—(Answer (c): Yes.)

Yes.

22. (a) Did the defendants, the local directors, exercise reasonable care in making the said three last-mentioned advances; if not in all, in making which did they fail to exercise reasonable care?—(Answer (a): Yes; all reasonable care.)

No; in respect of the security of the several conditional selections they failed.

And (b) did they verify the statements made by defendant Grimley as to the value of the lands to be given as security?—(Answer (b): Local board acquainted with value.)

No; they acted on their own real or supposed knowledge.

And (c) did they grant the said loans, or any of them, and if any which for the benefit of the plaintiffs or partly for the benefit of the Queensland National Bank?—(Answer (c): For benefit of plaintiffs.)

To relieve the bank.

And (d) was the defendant Grimley then largely, and if at all to what amount indebted to the said bank?—(Answer (d): Yes.)

Yes; no very distinct evidence about the amount.

23. (a) Were or are the securities given by the defendant Grimley to the plaintiffs in respect of any of the said three loans, and which if any of the said three loans, grossly or at all insufficient, and if at all to what extent insufficient apart from the question of dummyming or illegality?—(Answer: No, none.)

They are insufficient—worthless to the plaintiff company—so far as the dummied selections are included.

And (b) did the defendants, the local directors, know this fact, or ought they to have known it, or would they have discovered it had they taken reasonable care?—(Answer (b): No.)

They knew.

24. Did the defendants, the local directors, on the 22nd June, 1885, authorise and make a further advance out of the money of the plaintiffs to the defendant Grimley of £4,340 10s. 8d. without any further security than the land, machinery, and plant then held as security for the said three loans?—(Answer: Yes.)

Yes.

25. (a) Was the said advance of £4,340 10s. 8d. so authorised and made by the defendants, the local directors, carelessly and negligently and with the full knowledge that the defendant Grimley was in default in respect of all previous advances made by the plaintiffs to him, and had paid no interest in respect of the said sums of £7,000, £2,200, and £5,500?—(Answer (a): Not carelessly or negligently, but with knowledge of Grimley's position.)

It was.

And (b) was the defendant Grimley in fact in default in respect of the said advances and interest?—(Answer (b): Yes.)

Yes.

26. (a) Was the said advance of £4,340 10s. made by the defendants, the local directors, *bona fide* for the benefit of the plaintiffs?—(Answer (a): Yes.)

No.

(b) Was it made to enable the defendant Grimley to pay the same to the Queensland National Bank?—(Answer (b): No answer.)

Yes.

And (c) did he forthwith or at all pay the same to the said bank?—(Answer (c): Yes.)

Yes.

And (d) if so, was such payment made by him with the knowledge and approbation of the defendants, the local directors?—(Answer (d): Not answered.)

Yes.

27. (a) Did the defendants, the local directors, at the time of making the last-mentioned advance know that the defendant Grimley was largely or at all indebted to other persons than the plaintiffs?—(Answer (a): Yes.)

Yes.

And (b) that the security given to the plaintiffs was insufficient to secure the repayment of the money then already advanced thereon exclusive of the said £4,340 10s. 8d., or any part thereof, apart from any question of dummying or illegality?—(Answer (b): No.)

Yes.

Or (c) with the exercise of reasonable care might the defendants, the local directors, have known such last-mentioned fact?—(Answer (c): No answer.)

They could.

28. Did the defendants, the local directors, on the 12th February, 1886, advance from the funds of the plaintiff company to the defendant Grimley a further sum of £1,000?—(Answer: Yes.)

Yes.

29. (a) Was the said sum of £1,000 advanced *bona fide* for the benefit of the plaintiffs or for the benefit of the said Queensland National Bank, and in order that it might be paid by the defendant Grimley to the said bank in part discharge of

a debt due by him to the said bank, and was it in fact so paid?—(Answer (a): Yes, *bona fide* in interests of plaintiffs.)

Not for the benefit of the plaintiff company; as to payment to the bank, yes.

And (b) if so, was it paid with the knowledge and approbation of the defendants, the local directors?—(Answer (b): No answer.)

Yes.

And (c) did the defendants, the local directors, exercise reasonable care in advancing the said sum, and did they know that the security upon which the said sum was advanced was grossly insufficient?—(Answer (c): Exercised reasonable care.)

So far as the dummied lands are concerned, no reasonable care; and as to insufficiency in that respect, yes.

And (d) that at the time of the said advance the defendant Grimley was unable to meet his engagements and pay his debts as they became due?—(Answer (d): No answer.)

Yes.

And (e) ought the defendants, the local directors, to and with exercise of reasonable care could they and would they have known the two last-mentioned facts or either of them?—(Answer (e): No answer.)

Yes.

30. (a) Did the defendants, the local directors, in January, 1887, authorise and grant a further loan of £3,000 to the defendant Grimley?—(Answer (a): Yes; on recommendation of sub-committee.)

Yes.

And (b) if so, was such loan authorised and granted for the alleged purpose of enabling the defendant Grimley to pay off all liabilities then due by him and not fully secured other than his liability to the plaintiffs in respect of the various sums of money hereinbefore mentioned and interest thereon?—(Answer (b): Yes.)

Yes.

And (c) was such loan authorised and granted upon condition that the defendant Grimley should execute in favour of the plaintiffs, as security therefor, a second mortgage over certain land of the defendant Grimley in South Brisbane, then subject to a mortgage of £4,000 to the defendant Palmer as a trustee with another?—(Answer (c): Yes.)

Yes.

31. (a) Did the defendants, the local directors, in the month of January, 1887, advance the said sum of £3,000 to the defendant Grimley?—(Answer (a): Yes.)

Yes.

And (b) did they obtain a second mortgage over the said property in South Brisbane for £1,000 and further advances?—(Answer (b): Yes.)

Yes.

32. (a) Did the defendants, the local directors, at the time they made the said advance of £3,000, know that the said sum was insufficient to pay the liabilities of the defendant Grimley to persons other than the plaintiffs and not fully secured?—(Answer (a): Yes.)

Yes.

And (b) did they know that notwithstanding the said advance the defendant Grimley was

continue indebted to the Queensland National Bank and other persons in a large amount?—(Answer (b): Yes.)

Yes.

33. (a) Were the defendants, the local directors, or any and which of them, guilty of gross negligence in making the said advance?—(Answer (a): No.)

Yes.

And (b) did they or any and which of them omit to use reasonable care to protect the plaintiffs from loss in making the same?—(Answer (b): No.)

No; they had the sanction of Mr. Littleton.

And (c) did they or any and which of them in making the same omit to consider the interest to the plaintiffs?—(Answer (c): No.)

Yes.

34. (a) Did the defendants, the local directors, on 14th December, 1887, consent to the release of the said mortgage for £1,000 and further advances on the payment of £1,000, and did they release the same?—(Answer (a): Yes.)

Yes.

And (b) if so, was it so released in order to enable the defendant Grimley to execute a second mortgage over the said land in favour of defendant Palmer and another to secure £2,000 then lent to defendant Grimley, and upon an undertaking by defendant Grimley to execute a third mortgage of the said land in favour of the plaintiffs?—(Answer (b): In pursuance of his application.)

No; only what the local directors actually got.

35. (a) Was the said release made by defendants, the local directors, in the interests of the plaintiffs?—(Answer (a): Yes.)

Yes.

Or (b) was it made to enable the defendant Grimley to raise the said sum of £2,000 on security of the said land, and was £1,000 only to go, and did £1,000 only go, to the plaintiffs in consideration of the said release?—(Answer (b): Yes.)

Yes.

36. (a) Was the said release made by the defendants, the local directors, negligently and without reasonable care?—(Answer (a): No.)

No.

And (b) were the plaintiffs thus deprived of a security of the value of £4,000, and upwards?—(Answer (b): No.)

No.

And (c) have the plaintiffs lost the benefit they would have derived from retaining the said security?—(Answer (c): No answer.)

No; not the £2,000.

37. (a) Did the defendant Grimley, since the making of the said release, sell the equity of redemption therein for £2,000 or any other sum?—(Answer (a): No; but his trustees did.)

No; his trustees did.

And (b) if so, did he receive the amount thereof and apply the same for his own benefit, or was the same applied for his own benefit?—(Answer (b): No.)

No.

38. Did the defendants, the local directors, in March, 1888, make a further advance of £1,000 to the defendant Grimley without receiving any further security?—(Answer: Yes.)

Yes.

39. (a) Was the said last-mentioned advance of £1,000 made by the defendants, the local directors, carelessly and negligently and without reasonable care?—(Answer (a): No.)

Yes.

And (b) did they know that the only effect of the said advance was to increase by that sum and the interest thereon the amount of the plaintiffs' loss in respect of the dealings between the plaintiffs and the defendant Grimley?—(Answer (b): No.)

Yes.

Or (c) ought the defendants, the local directors, to, and would they if they had used reasonable care, have known the last-mentioned fact?—(Answer (c): No answer.)

Yes.

40. What part, if any, of the sums advanced by the plaintiffs to the defendant Grimley as alleged by the statement of claim has been repaid, and what sum, if any, has been paid to the plaintiffs in respect of interest on such advances?—(Answer: £181 5s. 9d.; £484 5s.; £768 1s. 11d.; £296 4s.; £1 19s. 6d.; £1 19s. 6d.; £2 1s.; £601 16s. 7d.; £701 1s. 4d.; £99 17s. 6d.; £964 5s. 8d. Of loan repaid, £1,000.)

£181 5s. 9d.; £484 5s.; £768 1s. 11d.; £296 4s.; £1 19s. 6d.; £1 19s. 6d.; £2 1s.; £601 16s. 7d.; £701 1s. 4d.; £99 17s. 6d.; £964 5s. 8d. £1,000 of loan repaid as abovementioned.

41. Have the securities mentioned in the statement of claim always been grossly insufficient and inadequate to secure the advances made upon them, apart from the question of dummying or illegality?—(Answer: No.)

Yes; and particularly in respect of the dummied lands, the salmon-coloured selections, and Moffatt's, by reason of the breach of the Act of 1876.

42. Were the advances agreed by the local directors to be made with a view to the ultimate acquisition of the lands by Grimley from the selectors, and by the plaintiff company as mortgagees?—(Answer: Not agreed.)

Yes; or for Bell and Sons, through Grimley.

43. Supposing the title to the lands to be liable to be affected by depreciation of value by proceedings for forfeiture, were the advances reckless or careless?—(Answer: Not agreed. Inferences to answers as to advances made for the purpose of paying for lands, no advances were paid over until after completion of mortgages for their security.)

They were.

44. Did the defendants, the local directors, honestly believe at the times of making the respective advances that they were advancing on good and sufficient security?—(Answer: Yes.)

No; they knew the conditional selections were being dummied.

45. Did they believe this apart from the question of "dummying" or illegality?—(Answer: Yes, certainly; yes.)

I have no evidence that they excluded the illegality from their consideration (even if they could) in determining the value of the security.

FOR THE DEFENDANT GRIMLEY.

Issues arising under Grimley's statement of defence not before specially dealt with:—

1. Was it in January, 1886, agreed between the defendant Grimley and H. S. Littleton on behalf of the plaintiffs that the rate of interest payable in respect of the various sums of money lent to the defendant Grimley by the plaintiffs should be reduced to 7 per cent. per annum?—(Answer: Yes, subject to account.)

Yes.

2. (a) Have the plaintiffs entered into possession and are they still in possession and receipt of the rents and profits of the lands comprised in the several mortgages in the statement of defence of the defendant Grimley mentioned?—(Answer (a): Yes.)

Yes.

And (b) have they also taken possession of, sold, and realised on the properties comprised in the several bills of sale in such statement of defence mentioned?—(Answer (b): Yes.)

Yes.

And (c) have they never accounted to the defendant Grimley for such rents, profits, and proceeds?—(Answer (c): No).

No.

ISSUES UNDER DEFENCE OF LOCAL DIRECTORS.

1. Prior to the incorporation of the plaintiff company, had arrangements been made by the promoters of the company that in case the company was successfully floated two of the Queensland directors of the Queensland National Bank and that two of the London directors of the said bank should join the plaintiff company's board in Queensland and London, respectively, to secure the full co-operation of the said bank in the undertakings of the plaintiff company, and to enable the plaintiff company to commence business with a large connection already formed by the said bank in Queensland and under the experienced management of highly influential colonial directors?—(Answer: Yes.)

Yes.

2. In pursuance of such arrangement by the original articles of association of the plaintiff company, were the defendants Drury, McIlwraith, and Hart duly appointed three of the first directors of the plaintiff company in Queensland, and Jacob Levi Montefiore and Archibald Beardmore Buchanan respectively directors of the Queensland National Bank in London duly appointed two of the first directors of the plaintiff company in London?—(Answer: Yes.)

Yes.

3. In further pursuance of such arrangements and of certain provisions in that behalf in the said articles of association contained by deed poll dated August 13, 1878, and duly given under the seal of the plaintiff company, were certain powers and authorities conferred upon the defendants Drury, McIlwraith, and Hart as such directors, and was the plaintiff company on or about the 17th day of

December, 1878, registered in Queensland under the Foreign Companies Act of 1867?—(Answer: Yes.)

Yes.

4. (a) Was the defendant Palmer duly appointed a director of the plaintiff company in Queensland on or about the 22nd day of January, 1881?—(Answer (a): Yes.)

Yes.

And (b) did the defendants other than Grimley continue to hold their appointments as such directors of the plaintiff company from the dates of their respective appointments until September, 1888?—(Answer (b): Yes.)

Yes.

And (c) have they, since the formation of the plaintiff company, during all the times in the statement of claim mentioned, been large shareholders therein?—(Answer (c): Yes; more or less.)

Yes; more or less, up to a recent date.

5. (a) Had the payment by the defendant Grimley to the several vendors of the 12,778 acres and 3,049 acres mentioned in the statement of claim been at all times made?—(Answer (a): No answer.)

Yes.

And (b) had the purchase of the said lands been completed by him before any advances were made to him by the plaintiffs in respect thereof?—(Answer (b): Yes.)

Yes; under arrangement or understanding with the bank and the local directors.

6. (a) In or about the year 1884, in pursuance of an agreement between the defendant Grimley and the Darling Downs and Western Land Company, Limited, were the sheep of the said company allowed to run for a short period upon certain of the lands last hereinbefore mentioned?—(Answer (a): Yes; with Jimbour manager.)

Yes; with the manager of Jimbour.

And (b) was a rental in consideration thereof duly paid to the defendant Grimley by the said company?—(Answer (b): To plaintiffs.)

Yes; or credit given for it in account.

7. (a) Were the advances or loans alleged in the statement of claim to have been applied for, authorised, granted, advanced, or made, as the case may be, so applied for, authorised, granted, advanced, or made?—(Answer (a): As answered.)

Yes; by the local directors.

And (b) was the release of the mortgage alleged in the statement of claim to have been consented to and made, so consented to and made to or by the plaintiff's board of directors for the time being in Queensland, as in the statement of defence (paragraphs 51, 52, 53, and 54) of the defendants other than Grimley alleged?—(Answer (b): 52, Yes; and 54, All care exercised.)

Yes.

8. Did the plaintiffs and their London directors at all times, and with full knowledge of all material facts, approve of and acquiesce in the advances and dealings of the defendants other than Grimley (in their statement of defence called the said board) in relation to the advances and each and every of them made by the plaintiffs to

defendant Grimley and otherwise in relation to the same?—(Answer: We consider the London board was in possession of all material facts.)

No; the London board were not aware of illegality of the selections, the salmon-coloured selections and Moffatt's.

9. Did the plaintiff company know and acquiesce in the "dummying" or contravention of the Act of 1876, if any?—(Answer: Not agreed; not agreed.) No.

10. Did the plaintiff company know and acquiesce in the inadequacy, if any, of any of the securities, and which of them?—(Answer: No answer.) No.

11. Did the plaintiff company know and acquiesce in the failure to obtain the second mortgage for £3,000?—(Answer: No failure.)

No; there was no failure.

12. Did the plaintiff company know and acquiesce in any, and which, careless or reckless neglect of duty, if any, on the part of the defendants?—(Answer: Plaintiff company at all times supplied with full information—material.)

No.

With respect to this list and the general list, the questions generally, where the words "No answer" appear, it is so because no answer was needed.

JUDGMENT.

This action comes now to be decided so far as the judge of first instance is concerned in the disposal of it, on the final hearing of the issues of fact and law before him and on motions for judgment on behalf of the plaintiff company, and defendants, respectively, and on the defendant's demurrers to the case made on the amended statement of claim. I may as well dispose of the demurrers at once. I think the amended claim raises good legal issues under the Crown Lands Alienation Act of 1876, entitling the plaintiff company to judgment on the greater part, almost the whole, of the case if proved. I therefore overrule the demurrers. The question of costs I reserve for further consideration, when the whole of the costs on all the issues, &c., must be considered and allowed by the court, and counsel must be previously heard upon these important matters. Counsel for the plaintiff company moved for judgment as follows:—"The plaintiff company is entitled to the following relief: 1. As against Grimley.—An account should be taken of all sums advanced to him from the 2nd November, 1882, and interest thereon from the respective dates of the advances at the rates mentioned in the respective securities up to judgment. 2. That an account may be taken of all moneys paid by the defendant Grimley to the plaintiffs and of all money received by the plaintiffs for or on his account. 3. That Grimley may be ordered to pay the balance found due on taking this account. 4. And costs in the action. That is all the relief I claim against Grimley. Against the defendants other than Mr. Grimley,—If the findings of the jury should not be followed, and the questions that are unanswered should be answered in the plaintiff's favour, then I ask for judgment against all those defendants in accordance with the relief claimed. If the judge answers questions 11A to 11H in favour of the plaintiff, and refuses to follow 11F and 11E, I ask for judgment against all the defendants as follows: 1. Relief as claimed in the statement of claim in respect of the following advances, *i.e.*, £15,972 10s. and interest, that is the first advance on the 12,778 acres; as to £3,194 10s. and interest—that is, the second advance of 5s. on the 12,778 acres,—possibly as to £4,573 10s., and interest, some

doubt (being the advance of £1 10s. an acre on the 3,049 acres.) These were made on freehold lands but were connected with the illegal agreement, and the securities were collateral. The first transactions were illegal, and this was tainted with the original illegality. On the answers as they stand at present, as found by the jury, I submit I am entitled to the same relief against all those defendants (except Mr. Hart)—that is, all on the salmon-coloured selections. As to the mill loans—on the answers as they stand I submit I am entitled to judgment against all the defendants, except Mr. Hart, in respect of the £7,000 advance and interest, and the £2,200 advance. Those are in respect of the first two mill advances which were made or agreed to be made before the mill lands were made freehold, and while they were conditional selections. As to the further sums there is some doubt, because they were made after the mill lands were freehold, and they stand in the same position as the advance of £4,573 10s. on the 3,049 acres of the salmon-coloured selections—*i.e.*, the advance of £5,500, £4,340 10s. 8d., £2,000, unpaid on the South Brisbane transaction, and the last £1,000. As to the costs against the defendants other than Grimley, that is a matter for further consideration." Mr. Woolcock, for the plaintiff company, asked for judgment for further claims, which he contended were tainted with the original illegality. Defendants' counsel moved on the findings for judgment for the defendants, other than Grimley, with costs, the costs to be for further consideration. Counsel for defendant Grimley was willing to allow judgment to go as offered at the opening of the case—that is, judgment for an account, but submitted that if the transactions with the local directors were illegal and void, then on the authorities there must be judgment for the defendant, and in either form of judgment that the defendant Grimley should have all his costs of the action. The nature of the relief claimed appears from the amended statement of claim and other pleadings on which I found my judgment. This is what before our Judicature Act of 1875 would have been called a suit in equity. The trial in all these cases is before the judge alone, but the judge may allow the trial of the

whole or any of the issues before a jury. This action was entered for trial by the judge, then the defendants entered it for trial by the judge with a jury, when a summons was taken out by the plaintiff company for trial by the judge alone, and on that summons the judge allowed a trial before a jury, but reserved the authority of the judge to try it alone. That reservation appears in the order of the Chief Justice of the 16th October, 1891, as follows: "And I do further order (reserving leave to myself to discharge such jury and to try the said actions or either of them without a jury, if at such trial I should see fit so to do) that each of such actions be tried before a special jury of four, and that," &c. The jury disagreed, and I discharged them. It was, on the application for a jury, represented to the judge, as the trial has proved, that an immense array of documents and the transactions of years must be investigated, that the expense of the trial before a jury would be enormous, the result doubtful for reasons connected with the financial and business circumstances of the colony, and that the issues would be, by reason of their number and difficulty with mixed legal and equitable considerations, beyond the grasp of the jurors. Many thousands of pounds have been spent on the trial alone before the jury, and if a renewal of the contest in that form is to be permitted, the cost will be utterly ruinous, and the result not one whit more certain or final, in my opinion, looking to natural local influences and circumstances. And so the process would probably be repeated before successive juries. It is hardly possible to contemplate such a condition of the action without a feeling of despair. It is contended that the judge alone has now no power to dispose of the action by giving judgment on the evidence taken on the trial. I know of no authority—none has been cited—which declares that where the judge has full power to try the suit or action alone in equity, or to direct the whole or any issues to be tried by a jury, he may not, in making the order for trial, reserve his own authority in the event of the jury failing to determine the issues. I think I have that power, where the jury have failed to find the vital issues, on which, in my opinion, the final judgment in the action depends, and more especially where, in my opinion, there is no reasonable expectation of better results from a trial before another jury. The jury have not only not agreed on matters which seem to me to be proved, but they have given inconsistent and irreconcilable answers on the amendments. Repeatedly during the trial I stated that I was conducting the inquiry so that, should the jury fail to agree, I would dispose of the case myself, and that it could then go from me to the Courts of Appeal without the necessity for taking the evidence again or for a new trial, because all the facts to enable the court to come to a decision would have been elicited. I think there is no doubt that is so; no new or additional evidence is expected. My offers to give time or to issue commissions to take evidence have not been accepted, and I think the court is in possession of all that is needed for a decision. Can it be contended that a delegation of issues to a jury is final

and conclusive of the judge's authority to try? If not, how many failures before juries must occur before he can resume his jurisdiction to try? If the direction to try before a jury is conclusive of the judge's authority, and no sufficient finding can be obtained from a jury, is the authority of the court gone? I think not, and that the cases show that the judge may exercise his original authority and hear the case, and give judgment, and that that is certainly so where he has made reservations. The law is concisely stated by Brett (L.J.) in *ex parte Morgan, in re Simpson*, 2 Ch.D. 72, at p. 97, where he says: "If an issue has been properly directed upon a sufficient controversy of fact (as observed by Turner, L.J., in *Morrison v. Barrow*, 1 De G., F. and J. 633), and a jury has found upon it, and there has been a conflict of evidence upon it, and no leave has been reserved, neither the first court nor the Court of Appeal can make an order or decree inconsistent with the findings of the jury, though satisfied that there was a misdirection which caused the miscarriage, or that the verdict was against the weight of evidence." In not one of the cases cited for the defendants was any reservation made by the judge. Now, in this case all the essential reservations were made by me on granting the conditional order for a jury, again shortly after the opening of the case, also by statements during the trial, and by the formal reservations appearing on my notes. Moreover, the court is not obliged to enter judgment on findings which are contrary to its conscience (per the Lord Chancellor in *Morrison v. Barrow*), and I would add insufficient for final judgment on the disputed matters between the parties. I shall therefore give judgment on the evidence which has been taken, including the evidence on commission, entirely before me. In doing so I act upon my general authority as the judge to whom the cause is assigned, on the order of 16th October, 1891, and on the reservations made during the trial. By doing so I believe I consult the best interests of the parties, help to assuage a terrible outflow of money from the coffers of the suitors, and having kept the action in such position that any error may be corrected in either of the Appeal Courts, final justice may be done, the very right being determined between the parties. My decision is based on the whole of the evidence, but more especially on the evidence of the defendants Grimley, Mellwraith, Drury, Palmer, and Hart, and of Mr. Morehead and Mr. Graham Lloyd Hart, and on the documentary evidence, so far as it is legally applicable to the case of each defendant. The action is based on the claim against Grimley for repayment of the loans made to him out of the funds of the plaintiff company by the other defendants, the local directors in Queensland, and on the claims against the other defendants, as local directors, for breaches of duty or fraud, in making the advances to the other defendant Grimley. The transactions impeached are: 1st. The loans to Grimley on what are called the salmon-coloured selections, some 12,778 acres, in several conditional selections, which it is alleged he was, with the knowledge of the other defendants, by the use of the plaintiff company's funds, acquiring by means of dummy

selectors for Bell and Sons, or Joshua Peter Bell, or for himself, with some ultimate advantage to the Bells, but in any event in contravention of the provisions of the Crown Lands Alienation Act of 1876, and particularly of the 21st section of that statute. 2nd. The loans to Grimley on certain other conditional selections, containing 3,144 acres, called the "Mill lands," which, it is alleged, he was, with the knowledge of the defendants, and directly or indirectly by the use of the plaintiff company's funds, acquiring through Moffatt for Bell and Sons, or Joshua Peter Bell, or for himself, with some ultimate advantage to the Bells, but in any event in contravention of the provisions of "*The Crown Lands Alienation Act of 1876*," and particularly of the 21st section of that statute. 3rd. In respect of the omission to take from the defendant Grimley a second mortgage for £2,000 on his South Brisbane property. 4th. As to the advance of £1,000 to purchase bullocks for the mill business. 5th. As to an advance of £1,000 to obtain indulgence or time for Grimley from his creditors—other than the plaintiff company. Upon the third and fourth claims I think the plaintiff company is not entitled to relief against the defendants other than Grimley. It seems to me, after most careful and anxious consideration of the evidence, that they carried out the original arrangement with Grimley as to the South Brisbane property, and that the purchase money of the bullocks has been repaid out of the security provided for it. In respect of the £1,000 advance for time from Grimley's creditors, it must follow my judgment on the selections looking at his then already deep indebtedness to the plaintiff company, that he was insolvent in fact, and that the defendants took no further or better security. The strength of the plaintiff company's claim for equitable relief must rest upon the view I take of the transactions included in the first and second claims above stated. With regard to these conditional selections—the "salmon-coloured" and Moffatt's portion of the mill lands—the defendant's counsel have urged upon me that if I decide that Bell's and Grimley's or Grimley's action was illegal, I will disturb a great number of titles acquired by similar illegal means. I have no evidence before me that any such titles exist, and if they do the Crown or the legislature must deal with them. If they are in the hands of innocent purchasers for value from the original illegal holders, although the Crown might have a legal claim to enforce forfeiture, nothing but paramount public policy would probably constrain the Executive authority to disregard the equitable doctrine in favour of the title of an innocent purchaser for value without notice. I think the defendants by their conduct placed the plaintiff company outside the pale of innocent purchasers for value without notice. As to forfeiture by the Crown against selectors, great or small, who have by inevitable accident, oversight, misfortune, or other cause not involving deliberate fraud, failed to fulfil statutory conditions, I think there is not the least danger of any officious or unjust disturbance by the Crown Law Officers. I have no evidence that there are any persons outside this case holding land under any of the conditions named. If there are, they are not before me. If the lands in this case

were acquired by evasion or fraud, then it is no answer to say that other lands have been got from the Crown by similar reprehensible practices. It is contended, too, that the plaintiff company should litigate the titles with the Crown either originally or by including the Attorney-General as a party. I do not think on the authorities that that is required of them in respect of transactions which are absolutely void. Then it is said there may be waiver by the Crown. If so, let the defendants show it, the issue is on them, and let them show further that such waiver would bind the plaintiff company as between them and the defendants. I have no evidence of it, and it has not been even alleged that it exists. The authorities and our Act of 1876, I think, show that it is not necessary for the plaintiff company to litigate with the Crown. [See section 21 of the Act and *Tooth v. Power*, and other cases hereafter cited.] And if the presence of the Attorney-General were required the objection for want of parties comes probably too late in the day. Nor is it incumbent on the plaintiff company to apply to the Crown to affirm illegally acquired titles to lands or titles that never could be acquired by the means that were used to get them. It has been also urged on me that the plaintiff company having had an opportunity of proving their case before a jury, and having failed, I should disregard the amended issues, give judgment for the defendants on the pleadings as originally framed, and leave the parties to litigate the other issues in another action. I cannot take that view of my duty, even if I had power to act on such a suggestion. The waste of money alone would make such a course intolerable. I have mentioned these various matters to get them out of the way before dealing with the pith of the case, which is the claim of the plaintiff company for relief from the "dummied"—that is, illegally acquired—lands now necessarily in their hands, and in respect of which it has been suggested the Crown may have some claim against them for trespass, intrusion, or waste. It is not necessary for me to give any opinion on that—it would not relieve the defendants if they are otherwise liable—perhaps it might increase their burden if they are liable to relieve the plaintiff company. As already stated, I have considered all the evidence, and taking the issues as they went to the jury, and drawing my own independent conclusions, I have written answers to them. The questions and answers, with other findings herein, must be taken to be the conclusions of fact by the judge in the cause. The issues and answers are an appendix to my judgment, and are to be read as a part of it. I need not read them now. The parties can have copies from my associate. It appears to me from the evidence that Grimley, before Sir Joshua P. Bell's death, was working out the salmon-coloured selections for Bell and Sons by means of several selectors—not *bonâ fide* selectors under the Act of 1876, but nominal or "dummy" selectors, for whom they found rations, and to whom they paid wages. That those selectors performed the conditions of fencing and occupation not on their own behalf

but as the agents, or servants, or trustees for Bell and Sons, under an agreement express or implied to permit Bell and Sons to acquire the selections by purchase. That in the lifetime of Sir Joshua Peter Bell, when negotiations respecting the lands to be included in the Darling Downs and Western Land Company's estate were going on, Sir T. McLlwraith knew that these salmon-coloured selections were being dummied, and emphatically refused to have anything to do with them on behalf of the Darling Downs and Western Land Company. That Bell and Sons had at the time of the death of Sir Joshua P. Bell paid on account of the salmon-coloured selections a sum of £9,870, which the executors, the defendant Palmer and Mr. Morehead, knowing they could not legally recover it, did not sue for. That the defendants, McLlwraith and Palmer, knew at the time of, or shortly after, Sir J. P. Bell's death, that these salmon-coloured selections were being dummied, or about to be dummied by Grimley. That after the death of Sir J. P. Bell, and whilst the loans were being advanced, all the defendants knew that the lands were being dummied and were illegal acquisitions. That after Sir J. P. Bell's death Grimley, wishing "to carry out Sir J. P. Bell's ideas," continued to dummy these lands. That right through the period of the loans and the gradual acquisition of the lands, the defendants knew that Grimley was dummied, that the lands were not applied for "for the *bona fide* use, occupation, and benefit of the selectors in their own proper persons," but as the agents, servants, or trustees of Grimley, for his own benefit, or for the benefit of Bell and Sons, with some ultimate advantage to himself from the lands or otherwise. But anyhow that the defendants knew that Grimley was working out the lands through the selectors, and that they were all "dummies." It is enough in my view of the law to entitle the plaintiff company to relief if Grimley was obtaining the selections by dummied by an evasion of or fraud upon the Act to the knowledge of the defendants whether he was obtaining them for himself or for anyone else. That as to Moffatt's selections, the defendants knew also that Grimley was obtaining the titles and using the money of the plaintiff company from time to time advanced by them to him for the purpose of helping Moffatt to obtain the Crown grants to be transferred to Grimley in violation of the provisions of the Act (section 21). The mode of making the advances is described by Grimley, or may reasonably be inferred from his evidence; the guarantee of J. Alex. Bell, one of the firm of Bell and Sons, for £3,000, was given to the Queensland National Bank upon a promise or understanding with the local directors of the plaintiff company—that is, of the defendants other than Grimley, through Grimley—that on the completion of the titles—or supposed titles—the plaintiff company should make the loans they had promised to cover the cost of the titles so acquired; in fact, the Queensland National Bank was thus recouped for its advances on the salmon-coloured selections and on Moffatt's. We have only to look at the correspondence to see that Grimley was master and had complete control over the selectors and over Moffatt. Through

his hands alone came the means of acquiring the selections. I think Grimley's dummied and the defendant's knowledge are both clearly established on their own evidence. Moreover, I do not believe Grimley ever changed his intention to recover the £9,870 for Bell and Sons, and to benefit his old masters, by acquiring the lands for them. I think his alleged change of intention is imaginary, not his letter to Lady Bell, which was and is real. That letter clearly shows his method of dummied, and his motive for it. Grimley exercised acts of ownership over these lands, both the salmon-coloured and Moffatt's selection, from the time of Sir J. P. Bell's death till the lands passed as securities into the hands of the plaintiff company. He could not do these things lawfully on any honest procedure under the Act of 1876. The selectors having acquired the titles seemingly for him, but really for Bell and Sons, as far as they could do so disappeared. The same may be said of Moffatt's selections. I have no doubt the defendants knew all these things. It is pretended that these two ventures, involving advances and an ultimate liability of over £86,000, were undertaken for his own benefit by Grimley, a clerk or accountant of Bell and Sons, whose salary has never exceeded £500, and that in doing so he had, according to Mr. Drury's evidence, "cleverly got the benefit for himself of nearly £10,000" of the money of the men whose confidential servant he was, and has all along been. We have Grimley thus, as it is said, "carrying out Sir Joshua P. Bell's ideas" for his own benefit, entering without any apparent authority or transfer into the possession of these properties and the control of the dummies, and into a complete usurpation, dealing with the representatives of Sir J. P. Bell and J. A. Bell (Palmer and McLlwraith) in their other representative character as local directors of the plaintiff company for loans to secure these lands ultimately for himself. And they say they believe all this of Grimley; that he was, in fact, working out these selections through the selectors for his own benefit, and not for Bell and Sons or Sir J. P. Bell's estate, or the Bell family. But they thought he might recoup the £9,870, or a portion of it. They would know that the transaction was illegal, even if Grimley was obtaining these selections for himself. And then we have them receiving the deeds from his hands, or permitting them to be deposited in the Queensland National Bank as security for the temporary advances to Grimley on account of these selections and the mill business. The story is not credible that Grimley meant to appropriate all these valuable lands and timber, that he intended to take from the men, his old masters for 36 years, and least of all from the family of the man Joshua Peter Bell, of whom he thought "there was no one like him in all the world," the lands and possessions which the Bells had desired for themselves. I do not believe this of Grimley. I believe he was "true to his salt," and was, as he had always been, working on behalf of and for the benefit of the men whose devoted and faithful servant and friend he had always been, and by whom his services for near a lifetime have been and are still retained. His letter to Lady Bell (No. 279), and his letter to

Sir T. McIlwraith (Nos. 333 and 336, copy and original), written at an interval of three years, and admitted against him (Grimley) alone, tell, so far as Grimley is concerned, that there was no imagination in either, no change of intention to benefit himself and not his old employers, no speculation on his own account unless, perhaps, from the mill business. But above all his demeanour in the witness-box testified the truth, no fairy tale of cleverly acquired wealth for himself either of £9,870 or lands, but the plain fact that he was dummying for Bell and Sons with the aid of the selectors and of Moffatt. It seems to me that what the defendant McIlwraith refused to do for Sir J. P. Bell the defendants would not have done for Grimley if they had not known that Bell and Sons were behind him. It is remarkable that no ore from Bell and Sons, not even J. Alex. Bell, nor any one of the selectors, was called by the defendants to prove the *bona fides* of these transactions. So far as the Bells are concerned, the evidence of the illegality of their conduct is corroborated by the refusal of their representatives to sue for the selectors' promissory-notes for the £9,870, or whatever other amount they represent, on the ground that they had no legal claim. All the defendants knew that to the extent of £9,870 the transactions with the selectors of the salmon-coloured selections were illegal. At that point they began to lend to Grimley, and they knew that the taint of illegality ran through the whole supposed titles in the hands of these selectors, afterwards and notably through Grimley, who was making that expenditure through the selectors. The defendants knew at the very threshold of their dealings with Grimley that to the extent of £9,870 the foundation of these transactions was rotten, and that the title was illegal thenceforth, every tittle of it tainted. The defendants possibly thought if they could once get behind the shelter of a certificate and a grant they were safe. And now as to the law as it stood in 1876 under the Crown Lands Alienation Act of that year, and during the whole period of making the advances on the salmon-coloured selections and on Moffatt's selections. "The Crown Lands Alienation Act of 1876," in section 4, confers and limits the authority of the Governor in Council to alienate the public lands of the colony. It enacts in section 4 as follows: "The Governor in Council may in the name of Her Majesty and under and subject to the provisions of this Act grant and alienate in fee-simple or for any less estate any waste lands of the Crown within the colony of Queensland. Every such grant or alienation shall be made in such form as shall from time to time be deemed expedient by the Governor in Council and being so made shall be valid and effectual to convey to and vest in the person therein named the lands described in the deed or instrument of alienation for such estate or interest as shall be set forth in such deed or instrument. Every such grant or alienation shall be made subject to such reservations and conditions as are authorised by the laws under which the right thereto shall have been acquired and subject to no other reservations or conditions." The policy of "The Crown Lands Alienation Act of

1876," and of similar Acts in the adjoining colonies, is to settle the people on the land, for that purpose to distribute the land by sale or otherwise amongst purchasers or lessees, and to limit the area that may be taken by each person with a view to prevention of land monopoly in the hands of a few possessors. Section 23 therefore enacts as follows: "The total area which may be selected or held by any one person at the same time under conditional purchase shall not be more than five thousand one hundred and twenty acres, nor shall the area of any land so selected be less than forty acres. Provided that the Governor in Council may by proclamation limit the area which may be selected or held under conditional purchase by any one person at the same time, within any district specified in the proclamation, to any area less than five thousand one hundred and twenty, but not less than six hundred and forty acres. If any conditional purchaser under this Act shall also be the holder of lands under conditional purchase under 'The Crown Lands Alienation Act of 1868,' the total area he may hold at any one time as a conditional selection under this Act shall not, together with the area he so holds under 'The Crown Lands Alienation Act of 1868,' exceed the maximum area allowed under this Act to be held as a conditional selection." And section 24 further enacts as follows: "Subject to the provisions of the last preceding section, any person who is the holder under conditional purchase of land under the provisions of 'The Crown Lands Alienation Act of 1868' or this Act, the area whereof is less than five thousand one hundred and twenty acres, may become the conditional purchaser of any adjoining vacant Crown land, the area whereof, together with that of the previous selection, does not exceed five thousand one hundred and twenty acres. Provided that the external boundaries of the two selections taken together be such as are allowed in the case of ordinary selections. In the case last aforesaid the two several selections so held by the same person shall, so long as they are both held by him under conditional purchase, be deemed for the purpose of the condition of occupation hereinafter mentioned to be the same selection." And section 25 further enacts: "Any person who is the holder under the said 'Crown Lands Alienation Act of 1868' or this Act of a homestead or of a conditional selection, and who shall have personally resided thereon for one year, may make one other selection by conditional purchase of any Crown lands open to conditional purchase. Provided that the maximum area of land allowed to be held under conditional purchase be not exceeded." And section 26 further enacts: "Except as aforesaid or as hereinafter expressly provided no person shall at the same time hold more than one parcel of land under conditional purchase." The salmon-coloured selections were situated within a homestead area, and were subject to the provisions of the Act applicable to that class of land. Section 38 in respect of these enacts as follows: "Country lands within homestead areas shall not be open to selection by conditional purchase except under and subject to the restrictions and provisions next hereinafter contained, that is to say: 1. The maximum area of

land that may be acquired by any person by conditional purchase in a homestead area shall be one thousand two hundred and eighty acres or such lesser area not being less than one hundred and twenty acres as may be declared by the Governor in Council by proclamation. 2. The condition of occupation shall be performed by the continuous and *bona fide* residence on the land of the lessee himself. Except as aforesaid all the provisions of this Act relating to the selection of land by conditional purchase and to land so selected shall extend and be applicable to land so selected in homestead areas." And section 101 with other sections are penal enactments. Section 101 is as follows: "Lands acquired by any evasion of or fraud upon the provisions of this Act shall be forfeited to the Crown." In respect of the salmon-coloured selections, amounting to 12,778 acres, the defendants must have seen from the excessive quantity of land that the word "dummy" might be written at once on Grimley's proposal for a loan of £15,972 10s. And to prevent evasions of the provisions of the Act of 1876, and fraudulent practices in the acquisition of public lands as private property, the prohibitive provisions of section 21 were enacted by the legislature. Section 21 enacts as follows: "No person shall, except by operation of law, become the holder of any land under conditional purchase or as a homestead who is under the age of 18 years, or who is a married woman not having obtained a decree for judicial separation or an order binding in Queensland protecting her separate property, or who is not a natural born or naturalised subject of Her Majesty, or who does not reside in Queensland, or who is in respect of such land or any part thereof an agent or a servant of or a trustee for any other person, or who has entered into any agreement express or implied to permit any other person to acquire such land by purchase or otherwise. And all land applied for by way of conditional purchase or as a homestead shall be for the *bona fide* use, occupation, and benefit of the applicant in his own proper person, and not as the agent, servant, or trustee of any other person. If any person shall, in violation of any of the provisions of this section, become the holder of any land under this Act, the Governor in Council may declare such land to be forfeited, and on proclamation of such forfeiture, all the right, title, and interest of the selector, and of every transferee in and to such land, and all moneys paid in respect thereof, with all improvements thereon, shall be absolutely forfeited, and shall revert to the Crown. And all contracts, agreements, and securities made, entered into, or given with the intent or which (if the same were valid) would have the effect of violating any of the provisions of this Act, and all contracts and agreements relating to land selected under the provisions of this Act made and entered into before or during conditional occupation to take effect on the fulfilment of conditions or on the issue of a grant in fee-simple, shall be and are hereby declared to be illegal and absolutely void both at law and in equity." It is with section 21 we are chiefly concerned. On that section the plaintiff company's claim for relief on this branch of the case is mainly

founded. My opinion is that in respect of the salmon-coloured selections neither the ostensible selectors, who were mere dummies, nor J. P. Bell, nor Bell and Sons, nor Grimley, nor the plaintiff company took any title. They legally acquired nothing and could pass nothing to anyone else, and the defendants knew this. Under the Act "any person" may become a purchaser of Crown lands. But section 21 is a disqualifying section, and every one of these selectors being "an agent or a servant of or a trustee for [some] other person" could not "become the holder of any land under conditional purchase or as a homestead" [section 21]. Nor could these selectors become the holders of any land under conditional purchase or as a homestead, having entered into "an agreement, express or implied, to permit [some] other person to acquire such land by purchase or otherwise." It matters not whether Grimley was purchasing for his own benefit, or for Bell, or Bell and Sons, or the plaintiff company, as the seeming selectors were in fact mere dummies, and were not holding the land "for their own *bona fide* use, occupation, and benefit in their own proper persons," but "as the agents, servants, or trustees of [some] other person." The defendants have sworn that they were told by Grimley that he was working out the selections for himself—that would be enough to show the illegal nature of his acts. There is irresistible evidence, to my mind, that these transactions were illegal and void, and that the defendants knew they were so. They may have thought they were doing a kindly act to some persons, and that there would be no eventual loss to the plaintiff company if the dummifying remained undiscovered. I think that by their conduct they have entitled the plaintiff company to relief against them—that the risk was their risk, and that the loss, if any, must be their loss. Then, with regard to Moffatt's selections, the arrangement between him and Grimley is quite clear. Grimley obviously had made a contract with Moffatt "during conditional occupation, to take effect on the fulfilment of conditions, or on the issue of a grant in fee-simple," which contract by the statute is declared "to be illegal and absolutely void, both at law and in equity." But a most important part of section 21 of the Act, the latter clause of the section, enacts that "all contracts, agreements, and securities made, entered into, or given with the intent, or which (if the same were valid) would have the effect of violating any of the provisions of this Act . . . shall be and are hereby declared to be illegal and absolutely void both at law and in equity." These stringent provisions make transactions such as Grimley was engaged in *illegal and void*, root, stem, and branch. The securities arranged for by Grimley with the defendants, the local directors of the plaintiff company, to enable him to acquire these lands are, therefore, void by force of "The Crown Lands Alienation Act of 1876." I refer to the following cases in support of my construction of our statute—viz., *Plant v. Johnston*, 7 Vict. L.R., "Law," p. 457; *Chambers v. Chambers*, 2 Vict. L.R., "Equity," p. 179; *Byrne v. O'Callaghan*, 13 Vict. Reports, 1887, p. 924; *Commercial Bank of Australia v. Carson*, 6 Vict. L.R., "Law," 310; *Tooth v. Power*, L.R.,

1891, Appeal Cases, 284. The Victorian cases were decided on a statute and section (21) identical largely with our own of 1876. It is not necessary to discuss the question whether the Crown by mere executive authority without new legislation can confer title on wrongdoers and validate the holding of them or their transferees, or give effect to securities acquired in violation of the Act of 1876, or which, if valid, would have the effect of violating the provisions of that enactment. It is clear that mere executive action unsupported by legislative power could not compel the plaintiff company to take title from a wrongdoer. Neither the final certificates of the fulfilment of conditions nor the Crown grants will afford shelter for the defendants. These instruments have the semblance of legality, but there is no evidence to show that the Crown officers knew of the deceit that was being practised. The certificate, which is called a final certificate, merely certifies that the selector has complied with the conditions of residence and fencing. It is clear from Sir Joshua Peter Bell's own statement to one of the defendants that he knew Moffatt had taken advantage of the officers of the Crown. He said Moffatt "had obtained the selections *legally*, through a mistake of the Lands Office." It is not unreasonable to infer that the officers of the Crown were ignorant of the whole of the illegal proceedings of all the parties to these violations of the statute, including both the salmon coloured selections and Moffatt's. It is certain that Sir Joshua P. Bell or Bell and Sons desired to possess the salmon-coloured selections, "the pick of Jimbour," and also the selections of Moffatt, with their valuable bunya timber. And the defendants knew that Sir J. P. Bell and (after Bell's death) Grimley were exercising acts of ownership over all these lands whilst in the hands of the dummy selectors and Moffatt. I have come to the conclusion that the transactions in respect of the salmon-coloured selections and Moffatt's were violations of the law of 1876 by the selectors, by Moffatt, by Sir J. P. Bell, by Bell and Sons, by Grimley, and by the defendants. I believe the defendants knew the nature of those transactions. Whatever, therefore, the defendants other than Grimley advanced on the fraudulently acquired selections was lost to the plaintiff company and they are entitled to recover it. Section 44 of our Real Property Act of 1861, and section 21 of "*The Crown Lands Alienation Act of 1876*," would prevent registration conferring title to these fraudulent appropriations of the Crown lands. The next question is whether the plaintiff company knew and acquiesced in these illegal land transactions. I find no reasonable evidence of acquiescence. When the plaintiff company, through Mr. Littleton, were making inquiries in Queensland into their affairs he wrote to inform them that Grimley had said some of the lands were dummied. That was after the dummying had been completed. But when Mr. Finlay (the plaintiff company's general manager) came out he claimed in respect of these dummied selections to be relieved from them, and shortly after that these actions were begun. Upon all the facts and documents then, I hold that the lands were

illegally obtained, that the defendants knew they were so gotten, that they committed breaches of duty in taking them as securities and in advancing the plaintiff company's money on them, that the defendants were reckless and careless, and did not act solely with a view of the interests of the plaintiff company. My further findings are, as I have said, in the appendix to this judgment. The illegality of these dealings runs through all the issues, and necessarily determines the answers as to duty, value of the investments, and final liability of the defendants. As to Grimley, I am unable to hold that he is discharged from liability to the plaintiff company by reason of the illegal dealings between him and the defendants, the plaintiff company's local directors. The plaintiff company did not know that such transactions were being carried on with their funds. They were not, moreover, in any way *in pari delicto*, and not liable for the unauthorised unlawful acts of their local directors. Some hint was given by the other defendants' counsel, during the argument, that the prospectus or instructions to the directors showed authority to acquire lands in these wrongful ways. I find no trace of it. There must, therefore, be judgment against Grimley. All amendments may be made to adapt the pleadings on either side to the facts, findings of the judge (not of the jury, which I have not used), and this judgment. The evidence of specific diminution of value on the lands adjoining the salmon-coloured selections for the advance of £4,573 10s., and on the additional mill lands for £5,500 and £4,340 (by reason of the worthless illegal investments) is not sufficient to demand a specific verdict for the plaintiff company in respect of those adjoining and additional lands. The total of the securities was, however, inadequate, by reason of the worthless character of the illegal acquisitions. There will be judgment for the plaintiff company against the four defendants other than Grimley:

1. As to the salmon-coloured selections of 12,778 acres for the amount of the advances on those areas—namely, £15,972 10s., the amount of the first advance of 25s. an acre, and for £3,194 10s., the amount of the second advance of 5s. an acre, with interest at the rates agreed on from the time of each of the advances till the 1st January, 1886, and thence at 7 per cent. per annum till judgment; subject to the account with credits to be taken hereafter in this action.
- 2nd. As to the mill lands (Moffatt's selections) judgment for the plaintiff company for £7,000, £2,200, with interest thereon at the rates agreed on from the time of each of the advances till 1st January, 1886, and thence at 7 per cent. per annum till judgment, subject to the account with credits to be hereafter taken in the action.
- 3rd. As to the value of buildings, machinery, or other material affixed to the freeholds of 1 and 2 (that is, the salmon-coloured and Moffatt's selections) there will be an inquiry and judgment against the four defendants other than Grimley.
- 4th. As to the £2,000 alleged loss by not taking a second mortgage on the South Brisbane property, there will be judgment for the defendants other than Grimley. I think they kept their original arrangement with Grimley.
- 5th. As to matters not specifically found against them, the defendants

will have judgment. 6th. As to the £1,000 to gain time from the other creditors, there will be judgment for the plaintiff company. There may, of course, be cross-appeals on the items I have disallowed to the plaintiff company or defendants. 7th. I reserve all questions of costs for further consideration. 8th. There will be all necessary and usual accounts and inquiries beyond those specially ordered. 9th. I reserve further consideration generally with all powers of amendment and other authority to do final and complete justice between the parties, either here or in the Court of Appeal. 10th. There will be leave to apply. The general rule as to costs which has been acted on in this court is that which Lord Westbury, L.C., laid down very distinctly many years ago—that the party who succeeds is entitled to his costs. The judge exercises a discretion to except certain cases, but it is not a caprice, it is governed by judicial considerations, and with reference to, and by way of exception only from the general right. The Master of the Rolls (Sir George Jessel), in *Cooper v. Whittingham*, 15 Ch. Div., 501, 504, stated the rule fully and with reference to its exceptions thus: “As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the court to deprive him of his costs—the court has no discretion, and cannot take away the plaintiff’s right to costs.” There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer where

a plaintiff asserts a legal right for a defendant to allege his ignorance of such right, and to say, “If I had known of your right I should not have infringed it.” For myself I see no reason to depart from the general rule in this case. The plaintiff company must have the general costs of the action and of all the issues on which they succeeded against the defendants Drury, McIlwraith, Palmer and Hart. The defendants Drury, McIlwraith, Palmer, and Hart must have the costs of the specific issues on which they succeeded in the findings and judgment of the Chief Justice. Grimley must pay the costs of the action so far as they relate to proceedings against him. His offer to give judgment made at the trial was for his indebtedness only, and not on the residue of the plaintiff company’s case, which he had traversed or not admitted. He must have his costs of the issue on which he obtained judgment—namely, as to the reduction of the rate of interest to 7 per cent. after the 1st January, 1886. All the defendants must, however, have, in addition to what I have already given them, the costs of the day on which the amendments were allowed, with the costs of preparing, filing, and delivering their traverses of those amendments. There is not the least reason to suppose that the line of evidence, or the volume of it, or any part of the procedure would have been different, or less in any essential matter, if the pleadings had been in every particular originally as they became by amendment; in fact, nothing had been thrown away or had become unnecessary at the trial by reason of the amendments. If it had, then the order I have made will sufficiently compensate the defendants for it. The plaintiff company will have the costs of the demurrers against the defendants, as to Grimley’s demurrer against him, and as to the demurrer of the defendants other than Grimley against them.

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Held, on a motion to set aside the award on the grounds aforesaid, that, on the construction of the submission, the parties took the arbitrators with their law, and were bound by their decision; and, that the award was good on the face of it. *Hodgkinson v. Fernie*, 27 L.J., C.P. 66, followed.

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Held, that the clerk had had the necessary supervision, and that under the circumstances he might be admitted to examination, and that a year out of the eighteen months might be

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83, 90. *Companies Act Amendment Act of 1889 (53 Vic., No. 18), s. 35.* A petition had been filed for the liquidation of the Queensland Deposit Bank. A scheme of arrangement was afterwards suggested, and on petition to the Court by a creditor, Warren, an order was made convening a meeting under sec. 35 of *The Amendment Act of 1889*, when the scheme was unanimously approved of.

On an application to sanction the proposal, the following order was made:—Sanction the scheme; stay all proceedings except for carrying out the order; the costs and expenses, and remuneration of the provisional official liquidator, and Warren's costs, to be paid by the Company; and the costs of the petitioning creditor, as between solicitor and client. The provisional official liquidator to be removed, and directed to hand over the assets to the Company. Leave to apply. A compromise may be sanctioned at any time after the presentation of a petition ... 179

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Held, (affirming the judgment of Harding, J.,) that the defendants were entitled to rescind the contract.

Held, further, that an innocent material representation which was false in fact as to kind and quality, is a ground for rescission of a contract on failure of consideration. And since *The Judicature Act*, if equity provides a remedy and the common law none, or the relief in equity is more complete, the rule of equity is to prevail; in this case, on equitable grounds alone, the contract ought to be rescinded.

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ceived official information of the non-existence of Livia, on 12th March, 1889.

At the trial before Harding, J., and a jury, the jury gave the plaintiff the £1,000 which he had paid for the run, and interest from the date of the payment and not from the date of the discovery of the mistake.

Harding, J., ordered judgment to be given in accordance with the findings of the jury, for £1,000 with interest from the date of payment.

By the Full Court the judgment was affirmed except as to the date from which the interest was to be computed, interest being allowed from the 12th March, 1889.

Where without fraud or concealment on the defendant's part, and without negligence or laches on the part of the plaintiff, but with entire ignorance on the part of both of them, that the subject matter of their bargain did not really exist (as was the fact), the one sold and the other bought and paid for a supposed run called Livia, which they both moreover honestly believed did exist, and there was thus never any consideration for the plaintiff's payment of £1,000, or the defendant's receipt of it; the defendant is bound to repay the amount. *Bingham v. Bingham*, 1 Ves. Sen., 126, followed.

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<i>Action under thirty pounds. District Courts Act, 1891, ss. 126, 127.</i> Judgment by default was signed for a sum under thirty pounds, and an application for costs, on the ground that the probable costs of a trial in the District Court would exceed the costs of judgment by default, a certificate under sec. 127 was refused.		6 <i>Geo. IV, c. 129</i> , is applicable to Queensland. The effect of 9 <i>Geo. IV, c. 83</i> , discussed ... 137	
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See PRACTICE	71, 100	<i>Held</i> , that the representation was untrue, and any confession or statement made by the prisoner subsequent to such representation could not be admitted in evidence against the prisoner. A detective untruly told the prisoner the murderer could be identified.	
COUNTERCLAIM—		<i>Held</i> , that no conversation with the prisoner subsequent to such representation could be received under sec. 64 of <i>The Evidence and Discovery Act</i> . The onus is on the Crown of rebutting the presumption that the subsequent statements of the prisoner were induced by the representation	218
See Costs	61	<i>Embezzlement. Larceny. General verdict. 29 Vic., No. 6, s. 77.</i> A prisoner was charged with embezzlement, the facts showed a case of larceny, the jury brought in a general verdict of guilty, and the prisoner was sentenced; but the sentence was suspended at the request of the prisoner's counsel to reserve the question.	
See PRACTICE	50	<i>Held</i> , that the question might be raised at any time before sentence, that the conviction must be reversed, the judgment vacated, and bail released.	
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<i>Justices Act (50 Vic., No. 17), ss. 181, 182, Summary jurisdiction. Receiving stolen goods. Larceny Act of 1865, ss. 4, 96, 102.</i> In cases of receiving stolen property, the summary jurisdiction of justices is restricted to the specific cases covered by section 102 of <i>The Larceny Act</i> .		See CROWN CASE RESERVED	63
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<i>Intimidation. 6 Geo. IV, c. 129, s. 3. Effect of 9 Geo. IV, c. 83. Excessive fine. Amendment. Justices Act (50 Vic., No. 17), ss. 173, 174, 214, 223, 225.</i> B. was convicted on a charge of intimidation under 6 <i>Geo. IV, c. 129, s. 3</i> . Certain shearers, besides B., were endeavouring to raise subscriptions for the defence of some fellow labourers then committed to trial. B. and another shearer asked some free labourers to subscribe to the fund. They refused to do so. B. then said "If you come here to dinner, I'll chuck you out," and made use of very foul language. The free labourers were also told if they came into tea they would be very roughly handled. They considered their lives in danger, and complained to the manager of the station. The justices fined B. £10, and £25 12s. 8d. for costs, in all £35 12s. 8d., or in default three months' imprisonment with hard labour.		CROWN CASE RESERVED—	
<i>Held</i> , that the language used amounted to intimidation; that the fine was excessive under section 173 of <i>The Justices Act</i> , inasmuch as the defendant would be liable to imprisonment for six months under section 174 of that Act, while the greatest term of imprisonment under 6 <i>Geo. IV, c. 129</i> , was three months, and that the fine must be re-		<i>Jurisdiction. Northern Supreme Court. 29 Vic., No. 13, ss. 48, 49. 38 Vic., No. 3, s. 7. 53 Vic., No. 17, ss. 4, 11, 17. 40 Vic., No. 2, s. 2. Perjury. Judicial proceeding. Small Debts Act (31 Vic., No. 29). Non-Amendment of proceedings.</i> The Full Court sitting at Brisbane, is the proper tribunal for a Crown Case Reserved by a Judge of the Northern Supreme Court.	
		Section 2 of 40 <i>Vic., No. 2 (Criminal Practice Amendment Act of 1876)</i> , is not impliedly repealed by <i>The Supreme Court Act of 1889</i> .	
		An action had been commenced in the Small Debts Court at Cairns, against Lum Hook and Chong Chow, trading together in partnership, for goods sold and delivered. The plaintiff abandoned the case against Chong Chow, and without amending the proceedings in any way, evidence was taken for the defendant, who, in the course of his evidence, committed the alleged perjury. Judgment was given for the plaintiff against Lum Hook alone.	
		<i>Held</i> , that this was a judicial proceeding, and it was competent for the Court to proceed in the action after the abandonment against one defendant, and that the conviction for perjury should be sustained	63
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Secs. 6 & 7. Valuation and Rating Act of 1890, secs. 4 & 11. Crown lands occupied for private purposes. Lands "vested" in corporation. Land temporarily reserved under sec. 6 of The Crown Lands Alienation Act of 1876, and placed temporarily under the control of a Municipal Council, is rateable when let to tenants who occupy it for private purposes.

Per CHUBB, J. : It is Crown land used for private purposes, and is not "vested" in the Municipal Council so as to come within sec. 11 (3) of The Valuation and Rating Act of 1890 ... 106

Section 49. Certificate to selector during his insolvency. Title to trustee. Right of Crown to costs on application. A selector under The Crown Lands Act of 1876 was adjudicated before conclusion of term. The Secretary of Lands had issued the certificate of fulfilment of the condition by insolvent before the close of the insolvency.

Held, that the property had been acquired during the insolvency, and had therefore vested in the trustee thereunder.

Held, also, that the Crown was entitled to the costs of coming into Court upon an application where its officers were in doubt as to rights of the trustee and the insolvent ... 4

Secs. 4, 21, 23, sub-ss. 8, 9, 10, 101. Real Property Act of 1861 (25 Vic., No. 14), ss. 33, 34, 96. Practice. Trial. Order XXXV, rr. 3, 28. Amendment. Defendants other than Grimley, viz., McIlwraith, Drury, Hart, and Palmer, constituted the Brisbane board of directors of the plaintiff company from 1882 to 1888. During those years these defendants authorised advances from the company's funds to defendant Grimley, which were secured partly by mortgages on lands in the Darling Downs district, known for the purposes of this action as "the selections" and "the mill lands." In 1887, Grimley being in default, the company took possession of the lands. On 6th September, 1888, the Brisbane board resigned, and the company now sued defendant Grimley upon covenants contained in the mortgages, and sued the other defendants for damages for negligence and malfeasance as local directors, or agents of the plaintiff company, in making the advances to Grimley. On a summons heard in Chambers, The Chief Justice made an order for trial of the action before himself and a jury, but in the same order reserved leave to himself to discharge such jury and try the action himself, if, at such trial, he thought fit so to do. During the trial, and before the close of the plaintiff company's case in reply, leave was granted to amend the Statement of Claim by inserting allegations that the securities taken by the defendants other than Grimley, for advances to the defendant Grimley, were insufficient and worthless, by reason of their having been obtained in contravention of section 21 of The Crown Lands Alienation Act of 1876. An application in Chambers to strike out the amendments as embarrassing, irrelevant, and tending to prejudice and delay the fair trial of the action, was dismissed, and defen-

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dants then pleaded and demurred to the amended Statement of Claim. The demurrer was ordered to stand over till the motion for judgment. The trial proceeded to a close, and certain questions were submitted to the jury, to some of which no answers were returned, whereupon The Chief Justice discharged the jury; and, on motion for judgment, and hearing the arguments on the demurrers, overruled the demurrers, answered the questions submitted to the jury, and gave judgment for the plaintiff company on the question of the insufficiency of the securities, holding that the selections and the mill lands had been obtained in contravention of section 21 of The Crown Lands Alienation Act of 1876, to the knowledge of the defendants other than Grimley, and that, therefore, the advances to the defendant Grimley were recklessly and carelessly made. The Chief Justice also held that there was no necessity to make the Crown a party to the action, on the ground that the plaintiff company did not ask the grants of these lands to be declared invalid.

On appeal to the Full Court (WINDEYER, COOPER, and CHUBB, JJ.) held, (reversing LILLEY, C.J.) that The Chief Justice had no power to make the reservation for trial by himself in the order granting a jury; that the amendments should not have been allowed in this case, as being made neither on a bona fide application, nor with reference to a matter which the parties originally came into Court to determine.

Held, also, that the demurrers should be allowed, and that, as there was nothing in the dealings of the defendants other than Grimley that was illegal, therefore defendants other than Grimley were not negligent as alleged by the plaintiff company.

Semble: That there is a general right to make objections to a Crown Grant, although the Crown itself does not take the objection, and that a Court may, in determining the rights of parties, be called upon to pronounce as to the validity of a Crown Grant in a suit to which the Crown is not a party, though it may not be able to set it aside absolutely, as in a suit where the Crown is a party.

Semble, also, that on production of a Crown Grant there is justification for assuming that, if anything irregular has been done in obtaining the Grant, the Crown has waived such irregularity.

Held, also, that a conditional purchaser under The Crown Lands Alienation Act of 1876 has a right to give a bona fide mortgage over the conditionally purchased land for bona fide advances.

Held, also, that section 21 of The Crown Lands Alienation Act of 1876 refers only to contracts made with the selector himself, and has no reference to contracts between third parties ... 224

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Practice. Wife's necessary costs as between solicitor and client, paid by petitioner, and added to his costs against co-respondent. In a suit for divorce for adultery the jury found for petitioner, with damages against co-respondent. A decree nisi was granted with costs against the co-respondent, including such costs as the judge should order petitioner to pay respondent.	
On the question whether the wife is entitled to costs as between party and party, or as between solicitor and client,	
Held, that the wife is in the same position as her husband, and she may incur such reasonable and extra costs as between solicitor and client as are absolutely necessary for the defence of her position as wife.	
Held, the wife's solicitor must bring in his bill for taxation as between solicitor and client for all costs, and not first for party and party costs, and afterwards, by an extra action, recover costs, as between solicitor and client, from the husband. Costs as between solicitor and client, or of the wife's solicitor, as between solicitor and client, must be charged and taxed on the strict footing of necessities. The costs when taxed on this basis ordered to be added by petitioner to his own costs, and recovered from co-respondent	25
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<i>The Dividend Duty Act of 1890, ss. 8, 9. Mortgage. Assets. Advances made out of Queensland on property within Queensland.</i> The Union Mortgage and Agency Company, Limited, had its head office in London. Their local manager made a return setting out that the company's average assets in Queensland for the year 1890 amounted to £22,000, while the other assets of the company amounted to one million pounds sterling. The company had advanced large sums to persons in and out of Queensland, on property in Queensland, at their offices in Victoria and New South Wales, and contended they were not liable to pay duty under <i>The Dividend Duty Act of 1890</i> on these advances.	
Held, on demurrer, that the moneys advanced on these securities, real and personal, situated within Queensland, were assets within the meaning of <i>The Dividend Duty Act</i> , and that duty was payable on them under ss. 8 and 9. The term "Assets" means property, wherever situated, used for the purpose of earning profit or dividend for the Company 192	
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Held, that the defendants were a company carrying on the business of mining in Queensland, and were liable to pay duty on all dividends declared, and that the duty should be paid, and the return in connection with the duty made within seven days from the declaration of the dividend, as provided by s. 7 of <i>The Dividend Duty Act</i> .	
Held, also (Chubb, J., dissentiente), that the chief place of business of the company was in Queensland.	
Per CHUBB, J.: The chief place of business was at London, and the return could be made at any time before the first of April, as in sec. 8 of that Act provided.	

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given notice of a second insurance, that assent to subsequent insurance was also assent to the renewal of the same, in the same or any other company. <i>Parsons v. Standard Insurance Company</i> , 4 U.C., Ap. 346, and <i>Pacaud v. Monarch Company</i> , 1 L.C.J., 284, followed	162
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<i>Re-hearing. Garnishee order absolute set aside.</i> On the motion of a claimant, who had no knowledge of the proceedings, and who would have been prejudiced by the original order, a garnishee order was re-heard and set aside	53
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The Guardianship and Custody of Infants Act of 1891, ss. 7, 13. Removal of guardian. Re- ligious education. J. McCrohon, a Roman Catholic, married a Protestant and had issue, two daughters. The mother died two months before the father. The mother was allowed to give her children, who were aged four and six years respectively, religious instruction in accordance with the rites of the Church of England. Before his death, and after making his will, the father in- structed one of the guardians never to allow a Roman Catholic to have charge of his children. McCrohon by his will appointed Land and Brown guardians of his children. A document, dated after the will, directed the children to be given to the testator's mother to be brought up in the Roman Catholic religion. On an application to change the guardians, and have the children brought up as Roman Catholics, <i>Held</i> , that children must be brought up in the religion of the father, unless he has expressed a wish that they should be otherwise in- structed, or unless he has abandoned his parental right under circumstances which would make a reassertion of it cruel and unjust to the children, and against their interests. <i>Held</i> , also, that if the document mentioned was signed by McCrohon with a sufficient under- standing of its contents, and as his last wish, the children must be brought up as Roman Catholics. Further evidence of the circum- stances of the change of intention on the part of the father, and of the execution of that document, were required before the final order could be made	202
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Held, that the husband was entitled <i>jure mariti</i> to his wife's goods, and that administration was not necessary, that sec. 27 of <i>The Succession Duties Act</i> did not apply, and that the Curator's claim should be dismissed with costs	106
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R. was convicted and ordered to pay a fine of £5, with £7 for damages, and £3 3s. for costs, or in default of payment, to be imprisoned for three months.	
Held, that this was a <i>bona fide</i> claim of right, and that R. should be relieved of the order for fine and imprisonment	160
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The question to be decided was whether the conveyance came under the exemption clause of <i>The Insolvency Act</i> , sec. 190, or was liable to the ordinary duty required under <i>The Stamp Duties Act of 1866</i> .	
Held, that the conveyance, which came after the certificate of discharge, transferred the insolvent estate not to a liquidating debtor, but to a discharged insolvent, who was in the same position as an outside purchaser, and must pay the stamp duty	59
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<i>Last examination. Jurisdiction. Northern Supreme Court. Insolvency Act, ss. 4, 164, 182, Rule 166.</i> Where an insolvent who had been adjudicated in Brisbane was resident at Townsville, a judge of the Northern Supreme Court has jurisdiction to hear the last examination of the insolvent, but the papers should be returned afterwards to the Supreme Court Office at Brisbane. An application to fix the examination before the P.M. at Charters Towers was refused ...	78
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<i>See PRIVY COUNCIL ...</i>	268
JUDICIAL SEPARATION— <i>Permanent alimony. Security. Injunction.</i> On an application for permanent alimony, security was ordered, and leave to apply for an injunction and receiver to protect the whole of the respondent's property for the benefit of the petitioner, if it appeared that the respondent was dissipating it, or putting it out of his power.	
<i>Noakes v. Noakes and Hill</i> , 47 L.J. (P.D. & A.), 20, and <i>Newton v. Newton</i> , 55 L.J. (P.D. & A.), 14, followed ...	104
JURISDICTION— <i>See ARBITRATION ...</i>	182
<i>See COMPANY ...</i>	64
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<i>See SMALL DEBTS COURT</i>	
<i>Practice. Perjury. Jurisdiction. 50 Vic., No. 17.</i> An action had been brought in the Supreme Court in which the real issue was whether a certain receipt put in evidence had been signed by the plaintiff, who denied his signature. The defendant swore that the plaintiff had signed it in his presence. The jury found for the plaintiff. An information for perjury was laid against the defendant. Before the time for appeal had expired, and during the course of the hearing of the criminal charge before the police magistrate, defendant obtained a rule nisi for a new trial of the action in the Supreme Court, on the ground of discovery of fresh evidence. Application was made to the police magistrate to stay proceedings in his Court until the disposal of the rule nisi for a new trial; but he declined, and stated his intention to take all the evidence for the prosecution, and then remand the defendant from time to time. Defendant then brought an action against the police magistrate, and obtained an order for an interim injunction, restraining him from proceeding until a certain day, with leave to serve a notice of motion for that day, for an injunction or <i>mandamus</i> to restrain him from proceeding until the disposal of the rule nisi in the action.	
<i>Held</i> , that there is no precedent for an action by a defendant against a justice for an injunction or <i>mandamus</i> to restrain criminal proceedings.	
<i>Held</i> , that under sections 107 and 108 of <i>The Justices Act</i> (50 Vic., No. 17), a justice has no authority, after taking evidence on a pre-	

liminary inquiry in a criminal case, to remand the defendant, pending the result of Supreme Court proceedings, but must either discharge or commit the defendant.	PAGE	
Though it is in a justice's discretion to proceed until restrained by the Supreme Court, it is a safe rule for justices not to entertain complaints when civil proceedings are pending in other Courts, in respect of the same subject matter. <i>Reg. v Ingham</i> , 14 Q.B., 396, approved...	17	
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See CROWN LANDS ALIENATION		
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See CRIMINAL LAW ...	219	
LIEN—		
See SOLICITOR, AND PRACTICE		
LIFE INSURANCE—		
Overdue premiums. Authority of agent. Lapse. <i>Estoppel</i> . The plaintiff's wife being insured in the defendant company, the premium became overdue. By the conditions of the policy, a period of 45 days' grace was allowed where premiums were in arrears; after which the policy was to be void, but the directors might at any time after the forfeiture revive the policy on such terms as they liked.		
After the lapse of the days of grace the plaintiff paid the premium to the defendants' agent at B., and a receipt was given him for the money.		
The agent had authority to receive overdue premiums after the lapse of the days of grace.		
The company, by express notice, had required that a satisfactory account must be given of the present health of the person seeking to make a renewal.		
The defendants knowingly permitted, before 26th July, 1889, their agent to receive payments of overdue premiums, where the policy had become forfeited, without proof of good health of the person assured at the time of such payment. The plaintiff and his wife were aware that the defendants' agent was in the habit of receiving overdue premiums without proof of good health. All the parties were aware that the agent had no authority to take the payment of overdue premiums without such proof after the 26th July, 1889. The premium was paid on 13th November, 1889, being after the due date and the days of grace, and the assured died on the 14th November, 1889.		
<i>Held</i> , (affirming the decision of <i>REAL, J.</i>) that there must be judgment for the defendants.		
<i>Semble</i> , an insurance company granting grace several times is not estopped from insisting upon the conditions of their policy ...	121	
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See BRANDS ACT ...	1	
In case of mistake, runs from time of discovery	80	
LOCAL GOVERNMENT—		
<i>Act of 1878, ss. 54-59 and 85. Ouster. Election.</i> These sections as to procedure are not merely instructive, but are compulsory; and that it is not discretionary with the Court to relax the law in favour of persons who disregard statutory provisions laid down for their conduct in connection with elections ...	5	
<i>Highway. 42 Vic., No. 8, s. 237. Permanent obstruction of highway.</i> A certain road was divided down the middle into two levels, and a fence was erected along the edge of the cutting. The fence was intended to be permanent.		
<i>Held</i> , that such obstruction of the use of the road was unauthorised by <i>The Local Government Act of 1878</i> , and illegal ...	30	
<i>Ouster. 51 Vic., No. 7, ss. 26, 43. Time of Nomination.</i> An objection was taken that a nomination paper for election was not entered before 4 o'clock as required by s. 43 of <i>The Divisional Boards Act of 1887</i> .		
<i>Held</i> , that as the time in dispute was so short, the time taken by observation of the sun must be shown before the Court could say the returning officer was wrong in receiving the nomination paper ...	191	
VALUATION—		
<i>Land. 52 Vic., No. 9, sec. 2. Notice of appeal. Jurisdiction. Person aggrieved.</i> A ratepayer gave notice of his intention to appeal against a valuation under sec. 2 of <i>The Valuation Amendment Act of 1888</i> , but did not state that he thought himself aggrieved by the valuation. The notice of particular valuation being given to such ratepayer as owner and occupier.		
<i>Held</i> , that by necessary implication the ratepayer was taken to have thought himself aggrieved, and that the justices had jurisdiction to hear such appeal.		
<i>Reex. v. Justices of Essex, 5 B. and C., 41; Rex. v. Bond, 6 Ad. & E., 906, distinguished ...</i>	40	
<i>The Valuation and Rating Act of 1890, sec. 13, subsecs. 1, 5. Tramways Act of 1882, sec. 82. Rateable property. Land. Tramways are rateable property within The Valuation Act of 1890.</i>		
A tramway is land for the purposes of rating, but <i>quære</i> the basis of valuation ...	110	
<i>Local Government. Divisional Boards Act of 1879, ss. 60-64, 70. Divisional Boards Act of 1887.</i> The defendant was the owner of certain land in Yeerongpilly Divisional Board, from October, 1883, and was sued by the said Board for rates due for the years 1883-1887. The defence set up was that the defendant did not at any time during these years receive notices of valuation, or notices that rates had been made upon the land.		
In October, 1890, the defendant received notices purporting to bear date during the above-mentioned years, and notifying that an appeal Court would be held.		
<i>Held</i> , on demurrer, that as the rates were properly made and had become due, and all rights were preserved by the Act of 1887, the liability of the defendant continued, and the rates were payable...	125	
See CROWN LANDS ...	106	
<i>Valuation and Rating Act of 1890, s. 11, sub. 2. Land used for public purposes. 54 Vic., No. 13, s. 3.</i> In order to exempt lands used for public purposes from rating, it must be proved that the lands are used exclusively for public purposes. The exclusive user, essential to exemption, excludes anything which is not for the sole benefit of the public. The lands of the Acclimatisation Society and National Association are liable to rating inasmuch as they are let for pecuniary benefit.		

<i>Mayor of Essendon v. Blackwood</i> , 2 Ap. Ca., 574, followed ...	151
<i>Rating. Appeal. Fresh valuation</i> , 54 Vic., No. 24, s. 14. McGhie, Luya & Co. being rated by the Widgee Divisional Board appealed against the valuation, and objected to the jurisdiction of the Court, as no fresh valuation, within the meaning of <i>The Valuation and Rating Act of 1890</i> , had been made. The Board had adopted the valuation of the previous year, and the valuation conformed with Schedule ii. of the said Act. The justices upheld the objection, and refused to hear the appeal.	
<i>Held</i> , on appeal, that the justices had jurisdiction to hear the appeal, and that it was competent for the Board to adopt the previous valuation ...	207
See <i>ULTRA VIRES</i> ...	189
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Does not lie against a justice to restrain criminal proceedings ...	17
MARINE BOARD—	
<i>Prohibition. Navigation Act of 1876</i> , ss. 37, 38, 39, sub. 3. <i>Suspension of certificate. Mode of inquiry.</i> A Marine Board inquiry was held into a collision between the steamers "Eurimbla" and "Lismore." After the inquiry the Secretary of the Board wrote to B., third mate of the "Eurimbla," stating that the Board found he was in default, and called upon him to show cause why his certificate should not be suspended. B. received, along with the letter from the Secretary, a statement of the case upon which the inquiry had been ordered. At the second inquiry, at which B. attended to show cause, the Board acted on the evidence given at the first inquiry, and B. had no opportunity of cross-examining the witnesses. B.'s certificate was then suspended by the Board.	
<i>Held</i> , that B. had not had a full opportunity of making his defence, and that a rule nisi for a prohibition should be made absolute, with costs, against the Board ...	151
MARRIAGE—	
<i>Within prohibited degrees voidable, not void.</i> K. made a will in favour of his niece, and afterwards married her; he died, leaving a child, and without leaving a will subsequent to marriage, or impeaching the marriage.	
<i>Held</i> , that the English Act, 5 & 6 Will. IV, c. 54, does not apply in Queensland; and	
<i>Held</i> , that, he not having impeached the marriage before death, it was good; and there being no will subsequent to such marriage, he died intestate ...	16
MARRIAGE GIFT—	
<i>Cheque. Decease of drawer before presentation. Final judgment.</i> In June or July, 1889, F. made a gift in the presence of witnesses, of £500 by cheque to S., his daughter, to whom he had promised the amount on her marriage. He requested her and her husband to hold the cheque until 15th September, when there would be funds available for its payment; but in August he died, and the cheque was never presented. On an action against the executors for £500 with interest and costs,	

final judgment was ordered for the amount claimed, without interest; and costs were allowed both parties out of the estate ...	16
MARRIAGE SETTLEMENT—	
<i>Mistake. Rectification.</i> The female plaintiff directed one R. G. W. to have a marriage settlement prepared, enabling her "to do what she liked with her property." R. G. W. gave instructions for the preparation of settlement, giving her a life interest in the rents and profits, and enabling her to occupy the said land. Such settlement was duly executed by the female plaintiff and her husband, the male plaintiff, under the mistaken belief that it contained a power for the female plaintiff to do as she liked with her property.	
<i>Held</i> , the settlement should be rectified to accord with the actual intention of the parties, and an order was made for the insertion of a trust to sell, mortgage, demise, and otherwise dispose and deal with the property.	
<i>Torre v. Torre</i> , 1 Sm. and Giff. 518, followed ...	134
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See <i>REAL PROPERTY ACT</i> ...	57
<i>Interpleader. Married Women's Property Act, 1890</i> , ss. 4, 7. <i>Interest of woman married before the Act.</i> A woman married before the passing of <i>The Married Women's Property Act</i> , purchased certain goods with money left her by her father's will before that Act. The money was not settled upon her for her separate use. On an interpleader summons the issue raised was whether the goods purchased with such money were her separate property or her husband's.	
<i>Held</i> , that if a woman married before the commencement of the Act acquire a title to property which is not settled upon her for her separate use, such property is not her separate estate unless it falls into her possession after the commencement of the Act.	
<i>Reid v. Reid</i> , 31 Ch.D., 402, followed ...	205
MASTERS AND SERVANTS ACT OF 1861—	
<i>Section 3. Quashing order. Right to leave employment.</i> No definite agreement ...	50
<i>Secs. 3, 30. Agreement. Absenting from hired service. Reasonable cause.</i> Before a servant can be convicted of absenting himself from his service, or refusing to carry out his agreement under <i>The Masters and Servants Act</i> , it must be proved that he had no reasonable cause or lawful excuse for such absence or refusal, and that he <i>bona fide</i> believed he had no lawful excuse.	
<i>Held</i> , reversing the decision of the justices, that there was, under the circumstances, reasonable cause for the refusal to work ...	145
<i>The Wages Act of 1870</i> , ss. 2, 7. <i>Mortgagee. Warrant of distress. Notice to Mortgagee before lodging warrant.</i> Plaintiffs were mortgagees of land owned by L. Defendant, a labourer employed by L., sued and obtained a judgment for £15 ls. against him for wages. Execution was issued and lodged with the Registrar of Titles, as the judgment was unsatisfied. Plaintiffs took possession of the lands on 1st October, 1891, after the execution, and received no notice of the execution until after the warrant had been	

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lodged, except that in April, 1891, a general demand for wages was made on them. Defendant threatened to sell the land under the warrant for execution.		XXVIII., r. 7	79
<i>Held</i> , (Real, J., dissentiente) that if the work in respect of which the judgment was obtained was done upon the mortgaged land, the defendant was not entitled to lodge the warrant of distress with the Registrar of Titles, without first calling upon the plaintiffs to show cause why it should not be so lodged, or otherwise making them parties to the proceedings before the justices, before the warrant of distress was executed against the mortgaged land	194	XXIX., rr. 11, 12	50
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Liable for six months' wages of mortgagor's servant, even though mortgagor has other property, if the possession amount to hindrance or prevention. Hindrance is any impediment in the way of the servant getting his wages	13	See CROWN CASE RESERVED	73
A mortgagee in possession is entitled to prove as a preferential claim only for so much of the three months' wages as were earned prior to the taking possession	23	See JUSTICES	17
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NORTHERN SUPREME COURT—		Cross-examination upon affidavits in support of new trial. Depositions of deponent for Full Court taken and certified by the Registrar. Granting of new trial on ground of fresh evidence. Upon the cross-examination and re-examination of deponents as to matter in their affidavits filed in support of a motion for a new trial, which had been ordered to be taken after the granting of the rule nisi, the Registrar must take the depositions and certify them, for the use of the Full Court, along with the affidavits in respect of which they had been taken.	
See CROWN CASE RESERVED	63	Affidavits can be filed on both sides on a motion for a rule absolute for new trial, on the ground of discovery of fresh evidence, though only to establish the probability of a change in the result of trial, not to establish the truth of the facts	35
See INSOLVENCY	78, 115	Insolvent plaintiff's trustee, joined as plaintiff after entry of judgment. Trustee's disclaimer. Vacation of judgment. A successful plaintiff became insolvent. His trustee disclaimed. The defendants were refused leave to appeal to the Privy Council. On the unopposed application of the trustee, his name was struck out of the proceedings. On subsequent application of defendant before the Full Court, the trustee's name was restored to the record, and the judgment in the action vacated with costs of the action to the defendants, on the condition that they undertook to recover their costs as a debt against the estate, and not against the trustee or the insolvent.	
See PRACTICE...	44	Costs of the motion were also allowed both parties out of the estate, the trustee's in priority. Defendants were to have the amount of prior dividends paid in the	
NOTICE—			
Priority of <i>fi. fa.</i> See REAL PROPERTY ACT	33		
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Sec. 3. Previous conviction. Two informations presented simultaneously. A prisoner pleaded guilty to charges on different informations. The benefit of the Act was extended to him on the first, but not on the second, as he was convicted on the first	219		
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estate; but the trustee must not disturb the dividends paid ... 38

Jurisdiction of Northern Court. The Supreme Court Act of 1889, s. 11. Appeals from Northern Judges. Motions for new trial. By section 11 of *The Supreme Court Act of 1889*, 53 Vic., No. 17, which confers upon the northern judges within the northern district all the jurisdiction of the Court, "except jurisdiction on appeal from a decision of a judge of a Supreme Court," general powers are given; and an extended construction should not be put on the words "appeal from a decision of a judge." If two constructions of those words were possible, the limited construction is the proper one. As the law stood before the Act, appeals were always dealt with in various Acts and rules of Court, as matters coming from a judge alone, and as distinct from new trial motions. The Northern Supreme Court is excluded by this section from hearing an appeal from the decision of a judge sitting alone, or where he has directed a jury to find a verdict for either party, or where he has entered judgment upon admitted facts upon motion—the jury having been discharged. In all other cases, where there is a mixed function of judge and jury, and in all applications for a new trial, the proceedings should be taken before the Northern Supreme Court ... 44

Omission of question to jury. New trial under O. XXXVIII, r. 4. On the trial of an action on a promissory note for £400, alleged to have been made by defendant in favour of H., and endorsed finally to plaintiffs, the defendant denied having made the note, and said it was, including the signature, a forgery. He admitted having made two notes in favour of H., each for £100, one of which H. had told him was destroyed. The jury on the question—Was the note made by defendant? found that it was, but for £100 only, and that the word "one" and the figure "1" were altered to "four."

Upon this, judgment was entered for the plaintiff for £100.

Held, that the questions—whether the note had been altered, and whether the alteration was apparent—should have been put to the jury; and that on that ground there should be a new trial as to those two points, under O. 38, r. 4 ... 14

On a motion for a new trial, the sole question to be decided is whether there is a probability of the new evidence inducing the second jury to upset the verdict of the first jury. See PRACTICE ... 35

Practice. Setting aside order absolute. Former judgment restored. An order absolute for a new trial had been granted, subject to the defendant giving security for, or paying into Court before a certain date, the amount of taxed costs of the previous trial.

On failure by defendant to comply with the said conditions, an order was made setting aside the rule absolute, and the prior judgment consequently restored without an order ... 43

Counter-claim. Default of pleadings. Motion for judgment on admissions. O. XXIX, rr. 11, 12. O. XXXIX, r. 11. Where a de-

fendant delivered a statement of defence and counter-claim, and no joinder of, issue or answer has been served, the defendant is entitled to judgment on the statement of claim, and for the relief prayed in the counter claim ... 50

O. XIV, r. 1a. Judgment against married woman. Separate estate. Form of judgment approved. In an action against husband and wife, the wife did not enter an appearance, and judgment was signed by default against her. The judgment was subsequently vacated, and an order for judgment against her separate estate approved of ... 55

Setting aside judgment by default. Non-indorsement of writ. O. IX, r. 9. O. XXIX, r. 14. O. LVI, r. 6. The service of the original writ, as well as a copy, and the consequent non-indorsement on the writ of the day and month of service, are not sufficient grounds for setting aside a judgment by default ... 56

Petition. Affidavit of service. An affidavit stating that a copy of a petition to wind up a company, with a copy of the fiat or order of the Court indorsed thereon, had been served on the manager of the company, is not sufficient.

The original petition with the fiat thereon should be produced at the time of the service of the copy, the original petition being filed after the hearing.

Re Skitter, 3 Q.L.J., 128, followed ... 105

Final judgment. Order XIV, r. 1a. Appeal. Discretion of judge. If an order has been made under *the Judicature Act* or rules, in which a judge has exercised a discretion, the Full Court will not interfere with such order, unless for strong and substantial reasons.

Wallisford v. Mutual Society, 5 Ap. Ca. 685, followed ... 108

Final judgment. O. XIV, r. 1a. Setting aside judgment. There is an inherent power in the Court to prevent an abuse of its proceedings, and a judgment will be set aside if the circumstances of the case require it ... 125

Probate action. Default of pleading. Affidavit of scripts. Order XXI, r. 2. In a probate action, the affidavit of scripts must be filed before the defendant can apply to dismiss an action for want of prosecution. The summons to dismiss should state the nature of the default ... 124

Setting off judgments. Costs. Solicitor's lien. The plaintiff recovered judgment for the return of certain specific articles—damages and costs: the defendant, on the counter-claim, for a debt owing by the deceased. On an application that the judgment by the defendant might be set off *pro tanto* against the judgment for costs obtained by the plaintiff upon the claim:

Held, that the judgments could not be set off.

Lambarde v. Older, 17 Beav., 542, followed.

Held, also, that even if the judgments could have been set off, the Court, on the principle of *Simpson v. Lamb, 28 L.J., Q.B.*, would not, under the circumstances of the case, have allowed it, except subject to the lien of the plaintiff's solicitor for his costs ... 71

Parties. O. XVI, rr. 13, 15, 16. O. XXVIII, r. 7. Trustees and Incapacitated Persons

<i>Act (31 Vic., No. 19), s. 87. In order XVI., rr. 15, 16, the words "unless otherwise ordered" do not apply to dispensing with service on added defendants. Section 87 of The Trustees and Incapacitated Persons Act of 1867 does not apply before the hearing ...</i>	79
<i>Change of solicitor. An order for change of solicitor is made as of course ...</i>	79
<i>Garnishee Order. Notice by telegram. O. XLIV., r. 3. Notice to garnishees by telegram allowed to bind the debts in their hands ...</i>	100
<i>Cost of substituted service. O. III., r. 7a. Costs of substituted service were allowed in addition to the fixed cost of nine guineas ...</i>	100
<i>Order XIV., r. 1a. Requisites of affidavit in support of summons for final judgment. The affidavit in support of a summons for final judgment, under O. XIV., r. 1a, should contain a statement that the defendant has entered an appearance to a specially indorsed writ. Where an affidavit in support contained no mention of a specially indorsed writ or entry of appearance by the defendant, leave to withdraw the summons was granted on payment of the defendant's costs. <i>Fitzwalter v. Val Dare Opal Co.</i>, 3 Q.L.J., 162, followed ...</i>	157
<i>Specially indorsed writ. Order III., r. 6. Order XIV., r. 1a. Interest in blank. A writ was indorsed for calls upon shares, but the amount of interest claimed was not entered in the printed form of the indorsement, and the objection that the proceeding was invalid was overruled, and leave to defend given ...</i>	179
<i>Specially indorsed writ. Interest. O. XIV., r. 1a. O. III., r. 6. Amendment of writ. The writ in this case was indorsed for money lent at various periods during the year 1891, and, in addition, interest was claimed on each item at the rate of 8 per cent. per annum, under the provisions of s. 72 of The Common Law Practice Act of 1867. Held, that the claim for interest was not the subject of a specially indorsed writ, and that the plaintiff could not amend ...</i>	178
<i>Writ specially indorsed. Order III., r. 6. Order XIV., r. 1a. Interest not arising by contract. The writ in this case was indorsed for money paid by the plaintiff to the use of the defendant, and at his request, and interest thereon. A summons for final judgment was dismissed, as the interest claimed did not arise from a contract. <i>Gurney v. Small</i>, 1891, 2 Q.B., 584, followed ...</i>	178
<i>New trial. Rejection of evidence tendered after close of case. Discretion of judge ...</i>	208
<i>Non-appearance of appellant. Dismissal of appeal. When an appeal has been set down in the ordinary course, and is in the paper for hearing, if the appellant does not appear, the respondent is entitled to have the appeal dismissed with costs.</i>	
<i>Ex parte Lows</i> , 7 Ch. D., 160, followed ...	220
<i>New trial. Excessive damages. Liability of Sheriff for mistake of officer. Bona fides. The bailiff at Hughenden levied a writ of fieri facias on the goods of the plaintiff to satisfy a judgment against the plaintiff's sister. The bailiff was informed that the goods belonged to the plaintiff and not to his sister. The bailiff entered into possession, no inventory was taken, and the bailiff withdrew</i>	

after five days. No evidence was given of damages. The defendant paid £5 into Court and adduced no evidence. The action was tried before Chubb, J., and a jury. Chubb, J., directed the jury that in assessing the damages the jury were not to consider the motives (if any) which actuated the execution, unless there was a gross outrage and abuse of the proceedings of the Court, and the jury awarded £150 damages, and judgment was entered accordingly. On appeal to set aside the judgment on the ground of excessive damages, the judgment of the Court below was affirmed; it being held that, as no evidence was tendered in mitigation of damages, the Court was not justified in saying that the jury were manifestly wrong, or that the damages were such as reasonable men should not have given.

<i>Seemle, the Sheriff should have interpleaded on getting the notice from the plaintiff ...</i>	213
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PRIORITY OF REGISTRATION--

<i>See REAL PROPERTY ACT ...</i>	33, 70
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PRIVY COUNCIL--

Appeal to. Final judgment. 7 & 8 Vic., c. 69.

Order in Council of 1860. Judicature Act, ss. 4, 6, 10. A judgment given by a Judge in the first instance is not a final judgment within the meaning of the Order in Council, when the other side has given notice of appeal against such judgment.

In such a case, before appealing to the Privy Council, an appellant must exhaust all his remedies here by appeal to the Full Court.

<i>Dagnino v. Bellotti</i> , 11 Ap. Ca., 604, followed ...	268
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<i>Revocation of. See WILL ...</i>	197
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obtained, it must be served upon the prosecutor as well as the justices. If this is not done, and the statutory time for obtaining the rule has expired, the Court has no power to amend the rule by inserting the prosecutor's name.		RESIDUARY ESTATE—	
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The wife here charged her estate with the amount of her husband's debts to the defendants, by an unacknowledged agreement. None of the parties contemplated charging the husband's estate; in fact, did not declare the certificates of title as security in the husband's subsequent insolvency. Defendants ordered to return agreement for cancellation, and to deliver up her certificates of title to her ...	57	See CROWN LANDS ALIENATION ACT ...	4, 224
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		Misconduct. Suspension and fine. In this case the solicitor received a sum of money on behalf of a client. Instead of paying it over to the client, he retained it, putting the client off with various excuses. His reason to the Court for non-payment was seizure of his office and papers by a creditor, and consequent inability to make up an account between himself and his client.	
		The Court ordered payment of the money, and costs of the proceedings, to his late client by the solicitor; also of a fine of £50; that he be suspended from practice, with leave to apply to remove suspension at the expiration of twelve months, on proof of payment of the above sums, which was a condition precedent, and also on proof of abstinence from practice in the meantime, and of good conduct during suspension ...	49

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<i>Re-admission of.</i> A solicitor who had been struck off the roll for misconduct (<i>ante</i> 3 Q. L.J., 9), was re-admitted on proof of restitution, amendment, and present good character ...	176	31 Vict., No. 29, ss. 29, 34 ...	156
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<i>Secs. 3, 21. Stamp Duties Act Amendment Act of 1890 (54 Vic., No. 28), ss. 4, 21. Construction of agreement. Stamp duty.</i> The executors of H., who was in partnership with Watt and Gilchrist, agreed to sell H.'s interest in the freehold property of the partnership, on condition that the parties took over the whole of H.'s liabilities. H.'s share was one-third of 42,482½ acres, valued at ten shillings an acre. The third share of H. in that amounted to £7,077 la., but the whole of his liabilities, including partnership debts, amounted to £16,919 13s. 3d. A deed of transfer was executed of the land in pursuance of such agreement.		38 Vict., No. 3, s. 7 ...	63
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<i>See</i> WILL		<i>Sec. 2. No visible lawful means of support, or</i>	
SUCCESSION DUTIES ACT—		<i>insufficient lawful means. S. was arrested</i>	
<i>See</i> HUSBAND AND WIFE	106	for vagrancy. At the time of his arrest he	
SUMMARY JURISDICTION—		had money on him, and immediately before	
<i>See</i> CRIMINAL LAW	132	the arrest, a friend had taken S.'s gold watch	
SURETY—		and chain into safe custody. S. gave evi-	
<i>See</i> ADMINISTRATION	40	dence at the Police Court that he was the	
TAXATION—		owner of three racehorses, and produced	
<i>See</i> COSTS		receipts therefor; also, that he paid £1 per	
TOWN AGENT—		week for his board. S. was sentenced to six	
<i>See</i> ARTICLED CLERK	180	months' imprisonment.	
TRANSFER—		<i>Held, that the means of support must be pre-</i>	
<i>See</i> STAMP DUTIES ACT		sumed to be lawful until proved to be the	
TRIAL—		contrary, and that the conviction must be	
<i>New. See</i> PRACTICE		quashed	181
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defendant, J. Walters, transferred to trust-		<i>See</i> MASTERS AND SERVANTS ACT	
tees certain land in trust, "for and on		<i>See</i> MORTGAGEE IN POSSESSION	
behalf of W. W. (a minor), and S. G. W.,		WIFE—	
wife of J. Walters, and for their sole use		<i>See</i> HUSBAND AND WIFE	
and benefit." The said S. G. W. died, leav-		<i>See</i> MARRIED WOMAN	
ing W. W. surviving; W. W. then died,		<i>See</i> REAL PROPERTY ACT	
having devised all his real estate to the		<i>Presumption as to surviving husband. See</i> WILL	46
plaintiff.		WILL—	
The defendant, J. Walters, never gave up posses-		<i>Construction of</i>	42
sion of the lands to the plaintiff, or any		<i>No evidence of survivorship of husband or wife.</i>	
person entitled under the said nomination		<i>Presumption as to real estate under The</i>	
of trustees.		<i>Titles to Land Act, 22 Vict., No. 1, sec. 26.</i>	
The plaintiff claimed possession of the said lands.		<i>As to personality, English rule applied.</i>	
<i>Held, on demurrer, that the words constituted</i>		Testator and his wife were drowned at sea,	
<i>an estate for life only; that there was no</i>		at night, through the foundering of their	
<i>instrument under The Real Property Act,</i>		vessel in less than five minutes, after striking	
<i>and that the word "heirs" ought not to be</i>		a sunken rock, in deep water. There was	
<i>imported</i>	118	no evidence as to survivorship. The only	
<i>See</i> ACCOUNTS	54	evidence forthcoming was that of a survivor,	
<i>See</i> PRACTICE	38	who saw testator fall into the water, and saw	
<i>See</i> SOLICITOR	15	testator's wife standing on deck for about one	
<i>See</i> WILL	199	minute afterwards. Upon a suggestion that	
ULTRA VIRES—		an issue might be tried by a jury as to sur-	
<i>By-law. Hawker's license. The Local Govern-</i>		vivorship, the Court declined to direct an	
<i>ment Act of 1878, ss. 167, 248. Hawkers</i>		issue on the ground that there was no evi-	
<i>and Pedlars Act of 1849, s. 23. 48 Vic.,</i>		dence to go to them.	
<i>No. 15, s. 2. 50 Vic., No. 23, s. 2, sub. 5.</i>		The testator was five years older than his wife,	
The Municipal Council of Brisbane made a by-law		who died intestate. There was no issue.	
enacting that no person should sell or expose		On the presumption established by <i>The</i>	
for sale, except in the house, shop, or pre-		<i>Titles to Land Act</i> , sec. 26, in respect of	
misces of the person so selling, any farm pro-		realty, the wife being the younger was pre-	
duce or vegetables, except under a license		sumed to have survived. In respect of	
authorising him to do so.		personalty, the English rule was followed ...	46
Von Dohren was convicted of selling vegetables		Trustees of, allowed to convert partnership prop-	
in George Street, Brisbane, without a		erty into a joint stock company	199
license.		Charitable bequest. 25 Vic., No. 19, s. 3. <i>Regis-</i>	
<i>Held</i> that the by-law could not be construed to		<i>tration. Number of witnesses. 7 Vic.,</i>	
authorise the imposition of license fees for		<i>No. 16, s. 3. Succession Act, ss. 39, 45.</i>	
the use of the roads, and was not directed to		<i>50 Vic., No. 13, ss. 5, 6. James Swan, by</i>	
the regulation of the market, and so was		his last will, bequeathed <i>inter alia</i> a legacy	
<i>ultra vires. Conviction quashed</i>	189	to the treasurer of the Wharf Street Baptist	
UNION—		Church, and the Queensland Baptist Associ-	
<i>Rules of. See</i> MASTERS AND SERVANTS ACT ...	50	ation was appointed residuary legatee. Both	
		institutions were duly incorporated under	
		<i>The Religious, Educational, and Charitable</i>	

Institutions Act of 1861. The will was attested by two witnesses, but not registered. *Held*, without considering the effect of a less number of witnesses than three, that registration was a condition precedent to the validity of such bequests, and that they must fail ... 171

Revocation of probate. Acknowledgment of signature. Succession Act, s. 39. Costs. Probate of the will of James Cranley had been granted to Margaret Fahy, as sole executrix. The will bore the signature of the testator and two witnesses, Gleeson and Simpson. Gleeson made an affidavit in support of probate, stating that Cranley signed the will in the presence of the two witnesses, who signed in the presence of the testator and of each other. The jury found that the testator did not write his name, but that he acknowledged his signature in the presence of the two witnesses present at

the same time, and that the signatures of Cranley and Gleeson were made in the absence of Simpson, and before Simpson came into the room.

Held, that the acknowledgment was insufficient, and that probate of the will must be revoked. The acknowledgment of his signature by a testator must be made in the presence of the two witnesses before either witness subscribes his name.

Costs of all parties as between solicitor and client were allowed out of the estate.

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In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the matter of the WILL of GEORGE AH PAN, late of Capeville, in the Colony of Queensland, Publican and General Storekeeper, deceased.

NOTICE is hereby given that the Accounts in the above Estate, from the twenty-second day of June, 1896, to the second day of February, 1893, have been this day filed in my office, and all parties having any claim against the said Estate, or being otherwise interested therein, are required to come in before me at my office, Supreme Court House, Brisbane, on or before the eighteenth day of May, 1893, and inspect the said Accounts, and if they shall think fit object thereto. The said Accounts will be duly enquired into at my said office, on the above day, at the hour of ten o'clock in the forenoon.

Dated the seventh day of April, 1893.

M. JENSEN, Deputy Registrar.

MARSLAND & MARSLAND, Proctors for the Executors, Charters Towers. Agent—G. V. HELLICAR, Adelaide Street, Brisbane.

In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the matter of the WILL of JAMES ROWLAND, late of "The Bamboos," Tweed River, in the Colony of New South Wales, Farmer, deceased.

NOTICE is hereby given that the Administrator's Accounts from the fifteenth day of February, one thousand eight hundred and ninety-two, to the seventh day of January, one thousand eight hundred and ninety-three, in the Estate of the above deceased, have this day been filed in my office, and all parties having any claims on the said Estate, or being otherwise interested therein, are required to come in before me at my office, Supreme Court House, Brisbane, on or before Tuesday, the sixth day of June next, and inspect the said Accounts, and if they should think fit object thereto, and if no exception shall be taken to such Accounts, the same will be duly enquired into at my said office, on the above day, at the hour of ten o'clock in the forenoon.

Dated this twenty-first day of April, 1893.

M. JENSEN, Deputy Registrar.

J. R. GAIR, Proctor for the Administrator, Queen Street, Brisbane.

In the Supreme Court of Queensland.

In the matter of *The Trustee Act, 1889*, and in the matter of the TRUSTS of the WILL and CODICILS of ELIZABETH McINTYRE, late of Toowoomba, in the Colony of Queensland, Widow, deceased.

NOTICE is hereby given that the Accounts of Joseph Sharp McIntyre, John William Mattinson, and Samuel George Stephens, the Trustees of the above-named Estate, from the twenty-ninth day of November, 1890, to the twenty-fourth day of March, 1893, have this day been filed in my office, duly verified by the said Trustees. All parties claiming to be interested in the said Accounts, or in the Trust Estate, are required to come in before me at my office, Supreme Court House, Brisbane, on or before Monday, the twenty-ninth day of May next, and inspect the said Accounts, and if they shall think fit object thereto. Notice is hereby further given that whether any such objection is taken to the said Accounts or otherwise, the said Accounts will be duly examined and inquired

into by me at my office, on the above-mentioned day, at the hour of half-past ten of the clock in the forenoon. And notice is also further given that any person or persons who may, after such examination and inquiry before me as aforesaid, desire to oppose the passing of the said Accounts, or of any item or items therein, or the allowance to the Trustees of a commission thereon, or in respect of their management or sale of the Trust Property, must, within four days from the filing of my certificate, file, in the office of the Supreme Court, a notice addressed to the Registrar and to the Trustees, setting out the grounds of his, her, or their objections thereto, and also serve a copy of such notice upon the Trustees or their Solicitor in Brisbane.

Dated this twentieth day of April, A.D. 1893.

M. JENSEN, Deputy Registrar.

F. G. HAMILTON, Solicitor, 57 Queen Street, Brisbane, Agent for C. W. HAMILTON, Solicitor for the Trustees, Ruthven Street, Toowoomba.

In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the WILL of The Honorable and Reverend KENELM HENRY DIGBY, late Rector of Tittleshall, in the County of Norfolk, in England, Clerk, deceased.

NOTICE is hereby given that the Accounts in the above Estate, from the twenty-first day of January, one thousand eight hundred and ninety-two, to the nineteenth day of April, one thousand eight hundred and ninety-three, have this day been filed in my office. All persons having any claim against the said Estate, or being otherwise interested therein, are required to come in before me at my office, Supreme Court House, Brisbane, on or before Monday, the fifth day of June next, and inspect the said Accounts, and if they shall think fit object thereto, and if no objection be taken to the said Accounts the same will be duly inquired into at my said office, on the above-mentioned day, at the hour of ten o'clock in the forenoon.

Dated at Brisbane this twenty-first day of April, A.D. 1893.

M. JENSEN, Deputy Registrar.

FOXTON & CARDEW, Proctors for the Administrator, The Queensland Trustees, Limited, Brisbane and Ipswich.

In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the GOODS of JOHN PERRYMAN CLINCH, late of NIVE DOWNS, in the Colony of Queensland, Station Overseer, deceased, intestate.

NOTICE is hereby given that the Accounts of the Administrator of the Personal Estate and Effects of the above-named deceased have this day been filed in my office. All parties having any claims against the Estate, or otherwise interested therein, are requested to come in before me at my office, Supreme Court House, William Street, Brisbane, on or before Friday, the nineteenth day of May next, and inspect the said Accounts, and if they shall think fit object thereto, and if no objection be taken to the said Accounts, the same will be duly enquired into at my said office, on the day above-named, at the hour of ten in the forenoon.

Dated this eighth day of April, 1893.

M. JENSEN, Deputy Registrar.

CHAMBERS, BRUCE & McNAB, Adelaide Street, Brisbane, Proctors for the Administrator.

LAW CALENDAR FOR MAY, 1893.

Monday ...	1	Brisbane Dist. Court, Civil.
Tuesday ...	2	Port Douglas Dist. Ct., Criml. & Civil.
Wednesday ...	3	FULL COURT, BRISBANE.
Thursday ...	11	FULL COURT, TOWNSVILLE.
Monday ...	15	Cairns Circuit Court.
Wednesday ...	17	Brisbane Civil Sittings.
Tuesday ...	23	Townsville Civil Sittings.
Wednesday ...	24	Roma Dist. Court, Criml. & Civil.
Friday ...	26	Mackay Circuit Court.
Monday ...	29	Public Holiday.
Tuesday ...	30	Charleville Dist. Ct., Criml. & Civil.
		Holiday—Northern Court only.
		Brisbane Criminal Sittings.
		Bowen Circuit Court.

All communications to be addressed to P. B. Macgregor, Esq., Telegraph Chambers, Queen Street, Brisbane. Anonymous communications are invariably rejected. Utmost secrecy preserved. Index of cases reported will be published at the end of each year. MS. contributions will be returned to authors if not accepted.

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The Queensland Law Journal.

Edited by P. B. Macgregor and M. J. O'Sullivan.

Cases reported by George Scott, Barrister-at-law.

MONDAY, MAY 1, 1893.

WITH this issue is completed the fourth volume of the "Queensland Law Journal." The issue for this month has been limited to the index, which has been carefully compiled, and embodies the indices to the parts ending June, 1890, and June, 1891. The Journal will be continued as heretofore, and at the same rate of subscription, an announcement which the proprietors are enabled to make through the liberality of the Library Committee, who have in the past rendered substantial help, and have decided to continue that help for the present. The proprietors, while thanking those who have also helped by subscription and advertisement, would urge upon subscribers whose subscriptions have not yet been paid to remit same at once, and they take the opportunity of pointing out that subscriptions are payable in advance, so that payments for the coming year may be included. The proprietors desire also to express their thanks to members of the profession who have, during the past year, provided reports of cases, especially Messrs. Allan Macnaughton and C. Jameson, who have kindly forwarded reports of cases decided in the Northern Court, and which could not otherwise have been obtained.

AFTER many conflicting rumours, the reported abandonment by the present Attorney and Solicitor-General of their right to appear for private clients, except in the Privy Council and in the House of Lords, or in cases covered by existing retainers, has at length been officially confirmed. As a solatium for their submission to this self-denying ordinance, Sir Charles Russell and Sir John Rigby are, it seems, to receive for the contentious business of the Crown the usual professional remuneration, instead of being paid, like former law officers, on a lower and fixed scale of fees. We desire to record our active dissent both from the terms of this new arrangement and from the principle underlying it. The recent political (for it never rose to the dignity of a professional) agitation for the withdrawal of the law officers from private practice, drew its energy solely from the alleged adequacy of the salaries attached to these appointments, and the admitted indiscretion of Sir Richard Webster in undertaking the case of the *Times* before the Parnell Commissioners, and that of the Tramway Companies against the London County Council. But the provisions of the new compromise—for it is nothing better—contain a clear, though unconscious, recognition of the fact that the bare salaries of the Attorney and Solicitor-General are not sufficient to make these offices attractive to the highest intellects in the legal profession, and at the same time leave the present law officers of the Crown absolutely free to appear against public or quasi-political bodies in the Privy Council, or the House of Lords, or within the limits of existing retainers. Apart from these special considerations, however, our voice is still for the whole *régime* which the mischievous precedent established by Sir Charles Russell and Sir John Rigby, no doubt from a sense of duty and with becoming reluctance, threatens to supplant. Only once, so far as we are aware, in our modern legal history has it been asserted that the Attorney or Solicitor-General sacrificed his public duties to the interests of his private clients, and then the assertion preferred by the late Mr. Fawcett, on the questionable

authority of Sir William Harcourt—was disproved by the present Lord Chief Justice of England, who was at the time senior law officer of the Crown, in an *apologia* for himself and his predecessors hardly less brilliant and not less successful than that with which Newman repelled the onslaught of Kingsley. In the skilful hands of Lord Coleridge, Mr. Fawcett's charge perished miserably, and, in our judgment, the case for withdrawing the immemorial right of the law officers to engage in private practice perished with it. The duties of the Attorney and Solicitor-General are multifarious and annually increasing. The best intellect that the bar produces is required to discharge them. *Ceteris paribus*, the highest legal ability is to be found among the most successful practitioners of the law. But the leaders of the bar will not accept the law officerships of the Crown, with their precarious tenure of a few years' duration, if the dispersion of their *clientèle* is made a condition of the appointment. Moreover, we are satisfied that, even if this difficulty could be surmounted, the withdrawal of the law officers from the bracing atmosphere of forensic conflict, and from the sources of forensic experience, must in the long run be injurious to the service of the Crown and the interests of the public, and we trust that the precedent which the factitious agitation of last autumn has created, if it cannot even now be set aside, will at any rate not be followed by future Attorneys and Solicitors-General. The safest fetter to place on the freedom of the law officers is that which they have for centuries imposed upon themselves, and the only tolerable limitation of their professional liberty would be to prohibit them from appearing against public and quasi-political bodies.—*Law Journal*

In the Supreme Court of Queensland.

In the matter of *The Trustee Act, 1889*, and in the matter of the TRUSTS of the WILL of GEORGE RAFF, late of Brisbane, Gentleman, deceased.

NOTICE is hereby given that the Accounts of Alexander Raff, Harry Raff, and Joseph Orton Bourne, Trustees of the above-named Estate, from the twenty-eighth day of July, 1891, to the twenty-seventh day of February, 1893, have this day been filed in my office, duly verified by the said Trustees. All parties claiming to be interested in the said Accounts, or in the Trust Estate, are required to come in before me at my office, in the Supreme Court House, Brisbane, on or before Friday, the second day of June next, and inspect the said Accounts, and if they shall think fit object thereto. Notice is hereby further given that whether any such objection is taken to the said Accounts or otherwise, the said Accounts will be duly examined and enquired into by me at my office, on the above-mentioned day, at the hour of half-past ten of the clock in the forenoon. And notice is also further given that any person or persons who may, after such examination and inquiry before me as aforesaid, desire to oppose the passing of the said Accounts, or of any item or items therein, or the allowance to the Trustees of a commission thereon, or in respect of their management or sale of the Trust Property, must, within four days from the filing of my certificate, file, in the office of the Supreme Court a notice addressed to the Registrar and to the Trustees, setting out the grounds of his, her, or their objections thereto, and also serve a copy of such notice upon the Trustees or their Solicitors in Brisbane.

Dated the twenty-seventh day of April, A.D. 1893.

M. JENSEN, Deputy Registrar.

MACPHERSON & FREE, Lutwyche Chambers, Adelaide Street, Brisbane, Solicitors for the Trustees.

In the Supreme Court of Queensland.

In the matter of *The Trustee Act, 1889*, and in the matter of the TRUSTS of the WILL of WILLIAM HARLE, late of Brisbane, in the Colony of Queensland, Painter, deceased.

NOTICE is hereby given that the Accounts of James Campbell, the Trustee of the above-named Estate, from the second day of July, 1891, to the thirty-first day of December, 1892, have this day been filed in my office, duly verified by the said Trustee. All parties claiming to be interested in the said Accounts, or in the Trust Estate, are required to come in before me at my office, in the Supreme Court House, Brisbane, on or before Wednesday, the seventh day of June next, and inspect the said Accounts, and if they shall think fit object thereto. Notice is hereby further given that whether any such objection is taken to the said Accounts or otherwise, the said Accounts will be duly examined and enquired into by me at my office, on the above-mentioned day, at the hour of half-past ten of the clock in the forenoon. And notice is also further given that any person or persons who may, after such examination and enquiry before me as aforesaid, desire to oppose the passing of the said Accounts, or of any item or items therein, or the allowance to the Trustee of a commission thereon, or in respect of his management or sale of the Trust Property, must, within four days from the filing of my certificate, file, in the office of the said Supreme Court, a notice addressed to the Registrar and to the Trustee, setting out the grounds of his, her, or their objections thereto, and also serve a

copy of such notice upon the Trustee or his Solicitors in Brisbane.

Dated this 28th day of April, A.D. 1893.

M. JENSEN, Deputy Registrar.

In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the WILL and CODICILS of ELIZABETH MCINTYRE, late of Toowoomba, in the Colony of Queensland, Widow, deceased.

NOTICE is hereby given that the Accounts of Joseph Sharp McIntyre and John William Mattinson, the Executors of the Will and Codicils of the above-named deceased, from the twenty-ninth day of May, 1890, to the twenty-fourth day of March, 1893, have this day been filed in my office, and all parties having any claims against the Estate of the above-named deceased, or being otherwise interested therein, are required to come in before me at my office, Supreme Court House, Brisbane, on or before Monday, the twenty-ninth day of May next, at ten o'clock in the forenoon, and inspect the said Accounts, and if they shall think fit object thereto, and if no objections shall be taken to such Accounts, the same will be duly inquired into at my said office, on the above date, at the hour aforesaid.

Dated this twentieth day of April, A.D. 1893.

M. JENSEN, Deputy Registrar.

F. G. HAMILTON, Solicitor, 57 Queen Street, Brisbane, Agent for C. W. HAMILTON, Proctor for the Executors, Ruthven Street, Toowoomba.

In the Supreme Court of Queensland.

ECCLIASTICAL JURISDICTION.

In the WILL of AUGUSTUS OTTO WILLIAM ROUTH, late of Cairns, in the Colony of Queensland, Master Mariner, deceased.

NOTICE is hereby given that the Accounts from the twenty-second day of January, 1892, to the third day of March, 1893, with the Estate of the said Augustus Otto William Routh, deceased, of Andrew Joseph Thynne of Brisbane, in the Colony of Queensland, Solicitor, to whom Letters of Administration (with the Will of the said deceased annexed), of the said deceased's Personal Estate and Effects, were granted by the Supreme Court of Queensland, on the eleventh day of October, 1886, as the Attorney of Jennie Sarah Routh, the Widow of the said deceased, and the natural guardian of Frederick Augustus Routh, the sole Executor and Trustee of the said Will (for the use and benefit of the said Frederick Augustus Routh, and until he should attain the age of twenty-one years), the said Frederick Augustus Routh being then a minor, and to whom, on the third day of April, 1890, Letters of Administration with the said Will annexed were granted by the said Court as the Attorney of the said Frederick Augustus Routh, have this day been filed in my office, Supreme Court House, Brisbane, and all parties having any claim on the said Estate, or being otherwise interested therein, are required to come in before me at my said office, on or before Friday, the ninth day of June, 1893, and inspect the said Accounts, and if they should think fit object thereto, and if no exception be taken to the said Accounts, the same will be duly enquired into at my said office, on the above day, at the hour of ten o'clock in the forenoon.

Dated this 24th day of April, 1893.

M. JENSEN, Deputy Registrar.

E. H. MACARTNEY, Solicitor for said ANDREW JOSEPH THYNNE, A.M.P. Chambers, Brisbane.

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